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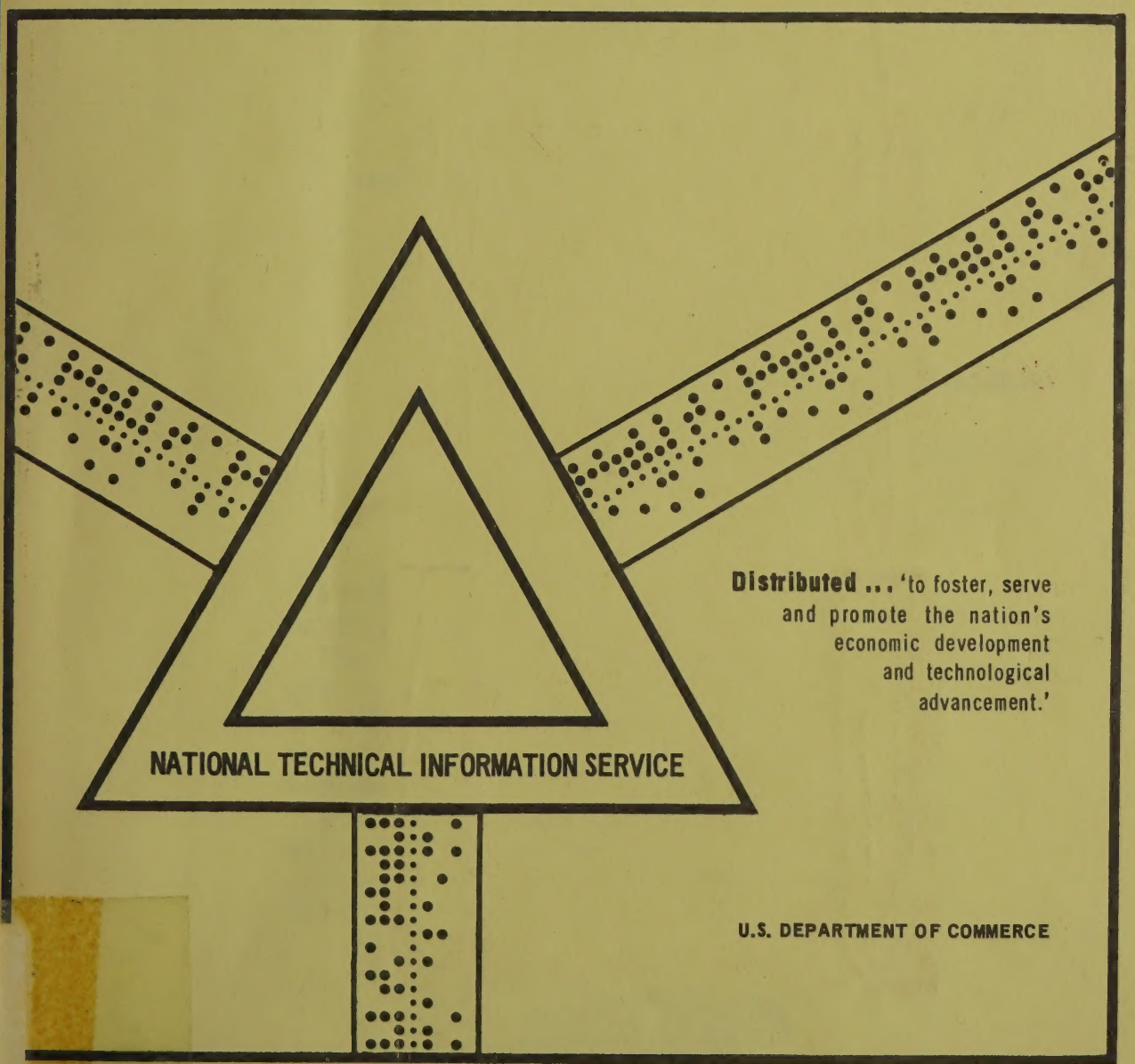
FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY. VOLUME III

Daniel, Mann, Johnson and Mendenhall
Los Angeles, California

November 1970



Daniel, Mann, Johnson & Mendenhall, Los Angeles.
Federal public land laws and policies relating to use and occupancy. Rev. ed.

FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY

Prepared for the
Public Land Law Review Commission

by

Daniel, Mann, Johnson & Mendenhall
Los Angeles, California

Volume III

Republished with revisions
November 1970

Prepared under contract with the Public Land Law Review Commission.

The opinions, findings, conclusions and data expressed in this publication are those of the authors and not necessarily those of the Public Land Law Review Commission.

This publication constitutes only one of a number of sources of information utilized by the Commission in the conduct of its public land study program.

STANDARD TITLE PAGE FOR TECHNICAL REPORTS	1. Report No. PLLRC-24-3	2. Govt. Accession No.	3. Recipient's Catalog No.
4. Title and Subtitle FEDERAL PUBLIC LAND LAWS AND POLICIES RELATING TO USE AND OCCUPANCY. Volume I II			5. Report Date November 1970 6. Performing Organization Code
7. Author(s) Daniel, Mann, Johnson & Mendenhall			8. Performing Organization Rept. No. 24
9. Performing Organization Name and Address Public Land Law Review Commission 1730 K Street, N.W. Washington, D.C. 20006			10. Project/Task/Work Unit No. 11. Contract/Grant No. 69-C-5
12. Sponsoring Agency Name and Address same as 9 above			13. Type of Report & Period Covered interim 14. Sponsoring Agency Code

15. Supplementary Notes

16. Abstracts

The report was designed to provide a comprehensive understanding of the existing laws, policies, practices and problems relating to the many occupancy uses of Federal public lands, the effects of the system, and possible alternatives to it. As used in the study "use and occupancy" refers to those uses of land which employ or utilize the spatial characteristics of land, as distinguished from its resources.

(NTIS abstract)

17. Key Words and Document Analysis. 17a. Descriptors

use and occupancy, public lands

transportation, utilities, residential, commercial, industrial

17b. Identifiers/Open-Ended Terms

17c. COSATI Field/Group

18. Distribution Statement	19. Security Class (This Report)	21. No. of Pages
available from NTIS	UNCLASSIFIED	170
	20. Security Class (This Page) UNCLASSIFIED	22. Price

FORM CFSTI-35 (4-70)

USCOMM-DC 45002-P70

Public Land Law Review Commission

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CHAPTERS XV - XVIII

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PART 5

ANALYSIS OF THE PRESENT SYSTEM

Part 5 describes and analyzes the problems associated with present public land laws, regulations and policies with respect to the various occupancy uses under consideration of this study. This analysis generally follows the outline used for the discussion of Parts 2 and 3. However, since one law often applies to several uses, residential, commercial and industrial, and community facilities have been included under the discussion of new and expanding communities. Emphasis is placed on the statutes as the basic source of policy and agency authorization to impose regulations on the retention and/or disposal of public lands for occupancy use purposes. This analysis describes the rationale of the law, regulation and policy giving rise to a problem. In Chapter XV principal occupancy use problems which are identified are discussed according to the following nine critical features as appropriate:

1. Purpose
2. Kind of Interest
3. Class of Land
4. Tenure
5. Qualifications of Applicants
6. Acreage Limitations
7. Charges
8. Conditions
9. Criteria for Selection

The appropriateness of the laws, regulations and policies are examined in light of changing conditions and in relation to whether they are (1) unique to a single agency's jurisdiction, (2) common to all agencies, or (3) a result of the application of statutes to a single agency. With regard to the latter, some statutes, relating to only one particular administering agency, may have applicability to other agencies administering Section 10 lands.

Railroad Rights-of-Way, Military and Other Federal Government Uses and Natural Areas are addressed to specific questions rather than to the above critical features. These are discussed in Chapter XVI. Also included in Chapter XVI is a discussion of resource use relationships.

CHAPTER XV

PROBLEMS RELATING TO OCCUPANCY USES

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PROBLEMS RELATING TO OCCUPANCY USES

I. TRANSPORTATION USES (EXCLUDING RAILROAD RIGHTS-OF-WAY)

A. Roads and Highways

1. Purpose

The statutes relating to road uses provide for a variety of purposes. The most general statute is 43 U.S.C. § 932, which provides authority for highway construction and public use over public domain lands. Other laws are limited to road use for either (1) a specific use, e.g., to private users for commercial or industrial purposes on public lands; 1/ or (2) certain classes of land, e.g., military reservations, 2/ reservoir sites, 3/ national forest lands. 4/ The Department of Agriculture may grant permanent or temporary easements for roads over lands administered by the Forest Service under the Act of October 13, 1964. 5/ Reference was made in Part 2 of this study to related laws, which are designed to control outdoor advertising along public highways, 6/ preserve natural beauty along public highways, 7/ or specify utilization of dams for highway bridges. 8/

Additional statutes 9/ and subsequent regulations 10/ deal with the appropriation and apportionment of Federal funds for the development of roads and highways. It appears from the above that existing laws are broad enough to allow roads to be constructed, used and maintained across Section 10 public lands.

2. Kind of Interest

At present, government surplus property can be disposed for road widening purposes. The governing statute 11/ has no limitations which could be construed as excluding productive use by the public or other users.

3. Class of Land

There are no use limitations relating to the authority under which lands were acquired.

4. Tenure

Both the statutes 43 U.S.C. § 932 and 43 U.S.C. § 956 provide for grants of rights-of-way. These grants essentially constitute an easement. These statutes make no provisions for term of occupancy, termination procedures, or provision for compensation to users upon termination of authorized use.

No action is required if the right-of-way is for construction of highways over public lands which are not reserved for public uses. For these, the grant is effective upon construction of the highway. If reserved land, or if revested and reconveyed land is involved, application must be made as regulated by 43 C.F.R. § 2234.1-2(a).

Rights-of-way authorized by 43 U.S.C. § 956 are not permitted within any park or military reservation. Application for a right-of-way under this act is required as specified in 43 C.F.R. § 2234.2-3(b)(6). Permits for a temporary right-of-way may be issued, subject to application, for a term of six months with one extension for not more than six months.

Since rights-of-way granted for roads are generally in the nature of easements and no term is specified, they are effectively a grant in perpetuity. A right-of-way can be terminated for non-use (2 years), however, when roads cross military lands under the provisions of 10 U.S.C. § 2668. The Chief of the Forest Service can terminate a right-of-way under 16 U.S.C. § 534 by consent of the owner, condemnation or upon abandonment after non-use for five years. There appears to be no major problems with regard to tenure for roads and highways across Section 10 lands. Tenure provisions for roads on private land are generally comparable.

5. Qualifications

Qualification of applicants for rights-of-way pursuant to acts governing public land use for road purposes present no particular problems. The applicable procedures for the Department of Interior are those which are standard to all rights-of-way 12/ and protect the public interest by ensuring citizenship of individuals and compliance with state requirements for corporations.

The Secretary of Agriculture has the discretionary authority to require an applicant, as a condition to obtaining a Department of

Agriculture easement across Forest Service land, to grant a reciprocal right to the United States to cross his land. 13/ This reciprocity requirement can be lawfully applied under 16 U.S.C. § 525.

6. Acreage Limitations

Generally speaking there are no limitations on the acreage of public lands for roads. Pursuant to 43 U.S.C. § 932 grants an undefined easement subject only to a reasonable width necessary for the use of the public as defined by a well marked line of travel. The question of width becomes a matter of state law.

An exception is provided in the case of tramroads across public lands where the right-of-way is limited to 50 feet on each side of the center-line under provisions of the Act of January 21, 1895. 14/

7. Charges

Under the general statute 43 U.S.C. § 932 and the regulations 15/ there is no reference to charges. Presumably, a "grant" for a public road denotes an exchange without consideration. The only reference to a charge is under the regulations applicable to permits received under 43 U.S.C. § 956, 16/ where a charge of fifty cents per mile per month is made for use of public lands under a temporary right-of-way for any user.

There appears to be no problems with pricing policy for the granting of road rights-of-way across public lands. The policy of the Bureau of Land Management and the Forest Service has been to grant easements with no charge for public roads. Although no public objectives are formally stated in law or regulation, the policy of the Department of the Interior and the Department of Agriculture has been to construe a public road right-of-way as providing a public benefit. For the use of public land by Special Use Permit for private access a charge of 5% of fair market value per year generally is levied by the Forest Service. This is consistent with the general accounting offices policy to base all permits for private use of public lands at fair market value. Where a private road would also serve for public access and/or for official business, a permit has generally been issued by the Departments of Agriculture and Interior at no charge to the applicant. It is assumed here that since the road would also benefit the general public, no charge should be levied the applicant.

For reciprocal grants between the Forest Service and a private pary under cooperative agreement, the cost of the road is shared by both parties and perpetual easements are granted.

8. Conditions

The Secretaries of Interior and Agriculture are authorized to stipulate conditions and restrictions for rights-of-way across public lands which are necessary to protect the public interest. This authority stems from each of the right-of-way statutes and is manifest in the general right-of-way regulations 17/ which apply to each agency under the Department of Interior. Pursuant to the Act of October 13, 1964, 18/ the Secretary of Agriculture is given jurisdiction over rights-of-way across national forest lands. As a condition to the granting of a right-of-way for special service roads, the Forest Service imposes standards of construction on these roads to control the width, soil compaction, protection of watershed, etc. It appears, therefore, that conditions necessary to protect the public resource can be imposed by both Secretaries on rights-of-way for roads across public lands.

Conditions imposed by right-of-way grants for roads on public lands present no major problems, except in the case of access roads to mining operations granted under the authority of the general mining laws. This is a case where the absence of conditions applying to mining roads have resulted in a failure to protect the public interest. This absence of conditions is not a reflection on the failure of any Federal agency to perform in the public interest.

Under the general mining laws there is question as to whether roads which provide access to valid mining claims can be construed as a part of the mining operation and, therefore, not subject to the regulations of the land managing agency regarding location and standards of construction. As a consequence, the public interest is poorly served because of lack of clearly established authority to control such roads.

Under the general mining laws, the Act of May 10, 1872, 19/ any citizen is authorized to occupy public lands in conjunction with the discovery and locating of a mining claim. No authority is provided any Federal agency to control the mining operation, or the restoration of the land disturbed by the mining. Since access roads to a mining area can be construed as a part of the mining operation, these roads may be exempt from Federal regulation.

The absence of any absolute authority to control mining access roads to mining operations subject to the general mining laws has resulted in soil erosion and deterioration of watershed. 20/ Further, the Federal land administering agencies, in lacking this authority, have been effectively precluded from managing the public lands in the public interest.

9. Criteria for Selection

A particular instance where the selection of public land for a road or highway differs from roads crossing non-public lands is in the case of road right-of-way across a national park, recreation area, or wildlife refuge. 23 U.S.C. § 138 declares a national policy to preserve natural beauty of countryside, public parks and recreation lands, wildlife and waterfowl refuges and historic sites. After the effective date of Federal Aid Highway Act of 1968 the Secretary of Transportation shall not approve any projects which require use of any publicly owned lands from a park, recreation area, wildlife or waterfowl refuge or historic sites unless (1) there is no feasible alternative to the highway plan, (2) the program seeks to minimize hazard to these areas. The purpose here is to preserve the public resources and scenic values of public lands. There are many instances where privately owned lands having similar aesthetic values have not been protected from harm caused by the construction of freeways. Private lands have been condemned for state highway rights-of-way with subsequent construction not providing for protection of adjacent private land resources or scenic values.

Similar criteria are used in the selection of road locations across national forest lands. The Forest Service policy to grant no easements, or permit no road construction where existing road systems would serve. This reduces the input on the Forest resource but may require applicant to use a road on which charges and restrictions are placed. In addition the Forest Service can control the location of roads by re-routing proposed access roads across forest lands in order to protect the watershed, prevent soil erosion and preserve the natural beauty of the forest.

B. Airports

Section 10 lands are conveyed for airport use under the authority of the Federal Airport Act of 1946, 21/ and the Surplus Property Act of 1944. 22/ In addition, land may be leased for airport use

under the Act of May 24, 1928. 23/ A detailed analysis of the scope and provisions of these statutes and their supporting Federal regulations may be found in Part 2 of this report.

Contact with officials of the Federal Aviation Administration revealed no major problems resulting from the application of these laws. Potential problems in providing land for airport facilities could result from pressures placed on Section 10 lands near areas of urban expansion. Land near most cities, however, especially large metropolitan central cities requiring airport facilities, is for the most part privately held. Since very little Section 10 land is found adjacent to large urban areas, very little such land has been utilized for airport use. As can be noted in Part 3 of this report, analysis of Section 10 disposals revealed that only 6,000 acres have been disposed for airport use under the Federal Airport Act of 1946 for the entire period from 1958 to 1967.

II. UTILITY TRANSMISSION FACILITIES

A. Electric Transmission Facilities

1. Purpose

Federal lands are available for rights-of-way for distributing electric power under the Acts of 1901 and 1911 24/ and for construction of electrical plants and substations under the Act of 1901. 25/ In addition, the Federal Power Act of 1920 26/ provides broad authorization for the use of public lands. A problem arises from the policy interpretations of the Act of 1911.

The policy of the Bureau of Land Management regarding the use of public lands by utility companies for the construction of substation sites has not been consistent. There is some question as to whether electrical plants, and substation sites are property permitted under the Act of 1911. 27/ Until recently the Bureau of Land Management has refused to grant rights for substation sites on the ground that the Act of 1911 does not cover permits for substation sites as the Act of 1901 does. As seen below, under tenure, the Act of 1901 does not allow any security of tenure, therefore utility companies do not generally apply for substation sites under this act. In November of 1966, the Bureau of Land Management granted a 50-year easement under the 1911 Act for a substation in Nevada. This substation involved an investment of approximately 14 million dollars. While the granting of this substation site appeared to indicate a change in policy on the part of the Bureau of Land Management, the Bureau indicated that this was a special case and that no change in policy was intended. There remains confusion as to whether the Secretary of Interior has the right to grant substations under the 1911 Act. This problem appears to be peculiar to the Bureau of Land Management and the Department of the Interior, as the Forest Service, for example, interprets the Act of 1911 to authorize the granting of substation sites. 28/

2. Kind of Interest

All public lands to be used for electrical plants for distribution of electrical power are retained by the Government with two exceptions. First, surplus government lands can be disposed of for electric distribution purposes by the General Services Administration when such lands are not needed by any government agency. Second, under the Public Land Sale Act of 1964, substation sites could be purchased from the Bureau of Land Management when construed as industrial facilities. However, since this act is scheduled to expire June 30, 1969, unless extended,

there would be no authority to dispose of land for this purpose. It is unlikely that disposals under this act for substation sites would preclude other productive use that could be made of the land.

3. Class of Land

Some lands, particularly lands reserved for national parks and wilderness areas, are sensitive to scenic values. In these areas, Federal agencies attempt to route electrical transmission lines to avoid such areas. Although public land users who have been affected by the rerouting claim additional costs and hardships, attempts to obtain data from these users which would quantify such costs were unsuccessful. Since the preservation of these areas is in the public benefit and since the hardships could not be quantified, there was no basis for suggesting changes in the existing policy.

4. Tenure

Generally, the terms of leases or easements for utility transmission line rights of way present no problems. One exception, however, has to do with the granting of rights of way for electric power under the Act of 1901. 29/ Under this act, all rights of way permits may be revoked by the Secretaries of Agriculture and Interior at their discretion. Consequently, utility companies generally do not attempt to obtain permits for substation sites under the 1901 Act where the contemplated electrical facilities will involve an investment of many thousands of dollars. The Act of 1911, on the other hand, authorizes the head of the department having jurisdiction over the public lands involved, under general regulations to be fixed by him, to grant easements for rights-of-way for a period not to exceed 50 years upon the public lands and national forests for electrical poles and lines for the transmission and distribution of electrical power, upon his finding that such right of way "is not incompatible with the public interest." Although the 50-year term is considered ample by the utility companies for rights-of-way under this act, question remains whether substation sites can be granted under this act as discussed above.

While a problem of tenure to utility suppliers is presented by the Act of 1901, it appears to relate only to the Department of the Interior. In the case of applications to the Forest Service for substation sites involving substantial investment, the Act of 1901 is used only for the purpose of giving a temporary permit to allow construction of the substation to begin. Since the tenure is longer under the Act of 1911, the Forest Service eventually grants the substation site under this act. This

procedure is followed because the processing of a permit under the Act of 1901 requires less time than does an easement or right-of-way under the Act of 1911.

Since this process appears workable and benefits both the user and the Forest Service, there is no reason to suggest a change in the Act of 1901 to allow more permanent tenure. The solution might rather come from a modification of the Act of 1911 to specifically authorize substation sites. This would have the effect of putting the Department of Agriculture through the Forest Service and the Department of the Interior through the Bureau of Land Management on similar grounds with respect to the granting of substation sites on public lands.

5. Qualifications of Applicants

Over the broad base of statutes authorizing disposal and retention of lands for utility transmission uses, there are no major problems with regard to the qualifications of applicants with one notable exception. This relates to a confusion which occurs under the authority granted by the Small Tract Act. 30/ This Act, as amended in 1954, provides in substance that the Secretary of the Interior, in his discretion, has authority to sell or lease a tract of not exceeding 5 acres of any vacant, unreserved public lands, public lands withdrawn by Executive Orders 6910 of 26 November 1934 and 6964 of 5 February 1935, or public lands withdrawn or reserved by the Secretary of Interior for any purpose, which the Secretary may classify as chiefly valuable for residence, recreation, business or community site purposes.

The regulations promulgated under this Act 31/ provide for a reservation for rights of way to be included in each patent issued in the following manner:

> The classification order may provide for rights of way over each tract for street and road purposes and for public utilities. If the classification order does not so provide, the right of way will be 50 feet along the boundaries of the tract.

Classification orders generally prescribe for an easement reservation or dedication of a specified width along the boundary of each small tract parcel for access roads and public utilities. The orders also provide that such rights of way be utilized by the Federal Government, state, county, or municipality in which the tract is located, or by any agency thereof.

The intent and purpose of the reservation is to provide for street and road access to the small tracts, and to enable and assist the tracts and their lessees or owners to have utility services extended and furnished to and in the tracts. While the intent and purpose are clear, the question has arisen as to whether or not under the wording of the classification order the reserved rights of way may be utilized for public utility purposes by an investor-owned electric utility that is not a governmental agency of the Federal Government, state, county or municipality.

As the investor-owned electric utility company does not appear to qualify under the classification orders, it has been necessary for these companies to obtain easements from both the patentees across lands which have been patented and from the Bureau of Land Management in order to insure that it has sufficient rights for its electric lines. This has been necessary even though the intent of the reservation is to preclude the need for a utility company to acquire rights-of-way across lands which are classified for small tracts.

The absence of authority to grant rights-of-way to investor-owned public utilities under this provision of the Small Tract Act does not appear to be based on the protection of any stated public interest. On the contrary, the intent of the reservation would seem to indicate that a public interest would be served by providing efficient utility service to small tract owners or lessees.

6. Acreage Limitations

There are no limitations as to acreage which would affect the use of public lands for utility transmission facilities. For transmission lines 100-foot rights of way are permitted under provisions of 43 U. S. C. § 959, while 400 feet are permitted by 43 U. S. C. § 961. There are no acreage limitations for utility transmission facilities on lands available for disposal by the Bureau of Land Management under 43 U. S. C. § 1421.

7. Charges

Generally speaking, the prices charged for utility transmission rights of way across public lands are reasonable and do not substantially differ from private market charges.

Problems may arise, however, from Federal pricing policies should the Departments of Interior and Agriculture exercise the authority promulgated under the regulations governing rights of way for electric power transmission lines, 43 C. F. R. 2234. 4-1; 36 C. F. R. 251. 52.

Questions of equitable payment may arise between the utility companies and the Department of Interior even though the regulations provide that Interior will pay the utility

> an equitable share of the total monthly cost of that part of the ... transmission facilities utilized by the Department for the transmission of electric power and energy, the payment to be an amount in dollars representing the same proportion of the total monthly cost of such part of the transmission facilities as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's transmission facilities bears to the total capacity in kilowatts of that portion of the transmission facilities.

Such monthly costs are to be determined in accordance with the system of accounts prescribed by the Federal Power Commission exclusive of any investment of the Department of Interior in the transmission facilities. The amount of payment is uncertain and indeterminate and since Interior can preempt the "surplus capacity" of the utility's facility and pay nothing unless, until and only to the extent that Interior actually uses such capacity, questions of equity will certainly arise. Such payment is limited to a part of the cost of only the facilities used by the Department of Interior even though the utility is effectively deprived of the use of the additional capacity of its lines. Consequently, questions of compensation for the economic losses caused by the inability to use the reserve capacity and potential increased capacity which was intentionally constructed into the facilities, as and when required, will appear.

8. Conditions

Conditions imposed on electric utility companies for the granting of rights of way across public lands has been the subject of much contention since the promulgation of right-of-way regulations by the Department of Interior 32/ and Department of Agriculture 33/ in March of 1963.

The subject of this contention refers primarily to two provisions of the regulations. The first is that a right-of-way for an electric transmission line of 33,000 volts or more will not be granted where the line will conflict with the "power marketing program of the United States."

The second is the requirement that the applicant file a stipulation permitting the Department of Interior to utilize any "surplus capacity" of

the transmission line or to increase the capacity at the Department's expense for the purpose of transmitting Federal power to certain preference customers as defined by law. Also under the stipulation the Department of Interior has the right to interconnect its transmission facilities with that of an applicant. Further, these conditions apply to the entire transmission line and related facilities from substation or interconnection point to substation or interconnection point, and not just to the portion of a utility's line which crosses lands over which either of the two Departments have jurisdiction.

These regulations are purported to serve two objectives:

a. To conserve public lands by limiting the number of right-of-way crossings, and

b. To promote the Federal power marketing program of the United States.

Complete analysis of these problems are hampered by the absence of case examples showing the actual utilization of surplus capacity by the Department of the Interior under authority of the regulations to transmit Federal power over a utility's lines. Investigation revealed no known cases where such capacity has actually been used by the Department of the Interior.

In the absence of records which indicate rights-of-way denial and the actual utilization of a utilities surplus capacity, it is impossible to assess the impact of these regulations on the practical operations of public land management regarding the use of Section 10 lands for electrical transmission. Until the Department of the Interior exercises its option to transmit Federal power, as authorized by the regulations, the public benefits derived cannot be determined, nor can allogations of increased cost to a utility company be substantiated.

Despite these limitations, there are a number of legal implications and policy ramifications which can be examined.

In order to understand the conflicts between the utility companies and the Department of the Interior it is important to review these regulations in terms of the seeming authority or lack of authority to deny rights-of-way across public lands if they will conflict with the power marketing program of the United States.

With regard to the first above mentioned provision of the regulations there is no question as to the authority granted the Departments by

statute to regulate rights-of-way across public lands in the interest of conservation and public land management. The Act of 1901 34/ and the Act of 1911 35/ clearly grant the authority to draft such regulations. These statutes, however, are also cited in the regulations as the authority under which the Department of the Interior can establish regulations to promote the Federal power marketing program of the United States. There is some question, however, as to whether this provision of the regulations goes beyond the statutes in providing that rights-of-way will not be granted where the line will conflict with the power marketing program of the United States. Many private utility companies contend that there is no Federal power marketing program. 36/ Statutes cited by the Department of the Interior implementing this program include the Tennessee Valley Authority Act of 1933, 37/ the Bonneville Act of 1937, 38/ the Fort Peck Act of 1938, 39/ and the Flood Control Act of 1944. 40/ Although a Federal power marketing program is not clearly defined by these Acts, the latter three suggest that there is a program relating to the marketing of surplus Federal power. The Tennessee Valley Authority Act of 1933 relates only to the Tennessee Valley Authority making no reference to the Department of the Interior or the Department of Agriculture.

In a Memorandum of Understanding published in the Federal Register of April 10, 1964 the Departments defined "the power marketing program of the United States" in the following manner:

> The power marketing program of the United States' refers to undertakings by the Department of the Interior, necessary or appropriate for the purpose of making electric power and energy at federal multi-purpose projects ... available in wholesale quantities to agencies designed (sic) by existing law as preference agencies and to other purchasers of electric power and energy at wholesale, or for the purpose of interconnecting those projects with other electric facilities ...

The issue becomes <u>not</u> whether there is a power marketing program, but whether the Secretary of the Interior has the authority with no apparent limitations or standards as to the exercise of his authority to deny a right-of-way across public land, for the reason that it conflicts with the power marketing program of the United States.

Although, there are no records indicating a denial to grant a right-of-way by the Departments of Agriculture or Interior, there have been no instances when a utility has not either signed the necessary

stipulations or entered into a contract which met the requirements of the regulations. This is an important issue since it is difficult to construct long distance transmission lines without crossing public lands. This is particularly true in the west where there are vast acreage of Section 10 lands.

While refusal to sign a stipulation or a contract would constitute denial of a right-of-way under the power marketing program, it is unlikely that a utility could afford to have a right-of-way denied.

While the Acts of 1937, 1938 and in particular the Flood Control Act of 1944 appear to relate to a Federal power marketing program, there are no expressed limitations and standards as to regulations that can be issued to govern power distribution. These are limitations, however, placed on the Federal Power Commission regarding power distribution. These are spelled out in the Federal Power Act. Neither the Flood Control Act of 1944 or the Federal Power Act, however, spell out the limitations and standards of the Department of the Interior for carrying out its responsibility for marketing surplus Federal power.

The definition of the "power marketing program of the United States" would not seem to be a sufficient indication of limitations and standards upon which a utility company could commit a substantial investment in the design and construction of a utility system.

It would appear that the Acts of 1901 and 1911 under which the regulations were issued relate only to the authority of the Secretary of the Interior to provide regulations governing the management of the public lands, and not to an authority to promulgate regulations or conditions governing a power marketing program. Since the Secretary of the Interior was not designated as the marketing agent for surplus Federal power until 1944 (Section 5 of the Flood Control Act of 1944), there is question as to whether the Acts of 1901 and 1911 were intended to authorize the Secretary of the Interior to deny a right-of-way across public lands because of any conflict with a power marketing program. Further, the legislative history of the 1901 and 1911 Acts suggest that congressional intent was to stimulate growth by encouraging the construction of transmission lines over public lands. In promulgating these regulations the Secretary of the Interior indicated that a public purpose would be served by encouraging optimum use of both Federal and non-Federal power systems. While this is a desirable objective, the discontent with these regulations which has ensued from their inception in 1963 to the present would suggest that the regulations have tended to discourage the optimum utilization of Federal and non-Federal power systems and to this extent it would appear that these conditions have not achieved the stated public purpose.

The question of the authority to promulgate the regulations under the Acts of 1901 and 1911 becomes a matter of interpretation of Congressional intent. If the statutes are interpreted to place no limitation on the Secretary of the Interior to draft regulations other than those limitations specifically expressed in the Act, it would appear that the Secretary has this broad authority. However, if the interpretation is that the Secretary is authorized to establish regulations according to the provisions specifically addressed in the Acts, then the authority to deny a right-of-way by regulation because it conflicts with the Federal power marketing program would seem to be beyond the authority of the statutes. Certainly these Acts must give the latitude to draft "conditions which the Secretary having jurisdiction over the land may consider to be in the public interest." However, the question becomes whether this relates to the public interest as custodian of the public lands as it would appear to suggest or custodianship with regard to the delivery of power at the lowest possible cost to the public. There is doubt as to whether the latter was intended in the Acts of 1901 and 1911.

The second provision of the regulations which is under contention requires that each utility receiving a right-of-way across Federal land must file a stipulation which will (1) allow the Department of the Interior to interconnect its transmission facilities, and (2) permit the Department to utilize what it determines to be "surplus capacity."

The utility can recapture its surplus capacity by giving 36 months notice, although the decision to release the capacity is subject to the discretion of the Secretary of the Interior. Similar regulations to those now imposed were in effect during the period 1948 to 1954.

There are, however, important distinctions between these regulations. The 1948 regulations applied only to lands under the jurisdiction of the Bureau of Land Management. Further, a utility had the right to recapture its capacity upon application to the Department of the Interior.

In 1954, the wheeling regulations were rescinded at the request of certain power companies. Congressional hearings in 1956 indicate, however, that the recision was solely a matter of administrative judgment. According to the Department of the Interior, it had been difficult to arrange for the wheeling of Federal power in the interim between the time the regulations were rescinded and again imposed. In order to market surplus Federal power to its preference customers, however, it is important that the Department of the Interior rely to a great extent upon wheeling arrangements with power companies. It has not been found practical, economical, or desirable for the Government to

deliver power to preference customers solely by means of Federal transmission lines. Such wheeling arrangements minimizes the amount of land excluded from other productive uses.

Clearly, there must be some procedure which will guarantee a degree of cooperation between the Federal Government and the power industry in the wheeling of Federal power. The question here is whether the broad undefined conditions, void of reasonable guidelines and limitations set by Congress, imposed by the present regulations are a reasonable exercise of executive authority.

There appears to be no limitations or standards upon which the Secretary can declare the capacity of a transmission line to be "surplus." No determination is made of the amount of surplus capacity that may exist in a transmission line at the time of the signing of the stipulations by an applicant and the subsequent granting of the right of way by the Secretary. Such determination is made only at the time the Secretary decides to exercise his authority to wheel Federal power over a particular transmission line. Further, there is no time limitations set upon which the Secretary has to exercise the wheeling of Federal powers. The exercise of this authority requires only a 30-day notice. The utility company affected, having no basis upon which to judge how much capacity Interior will need and when, cannot adequately plan its utility system.

There are numerous technical problems which must be considered in the planning of a utility system. An understanding and recognition of the purposes for which utility lines are constructed would appear to be essential in drafting regulations.

Transmission lines are constructed for essentially three main purposes:

(1) To provide for the transport of scheduled power,

(2) To provide interconnections to allow the interchange of emergency power, and

(3) To increase the reliability of electric systems.

Scheduled power includes any power that is scheduled ahead of time such as moving power from a generating plant to the load, providing for the interchange of economy power between systems, allowing the sale of surplus hydro-electric power. Emergency power is power

required for conditions that are abnormal as when an area has an extreme deficiency of generation due to unforeseen events. The building of lines to increase reliability is to allow scheduled and/or emergency power transfer to take place during outages of major transmission lines.

The purpose of a transmission line must be recognized and the line should not be expected to do a job for which it was not designed. For example, when a line is carrying scheduled power, it has less remaining capability to carry power during emergencies. Therefore, power should not be scheduled on a transmission line built solely for emergencies.

The determination of proper operating limits in the case of a major network consisting of interconnected systems is an extremely complex problem. Actions of one system can affect the reliability of all systems of the network. Uncoordinated unilateral action by a member system of an interconnected network or by another system affecting a member of the network would be irresponsible and untenable. The existing administrative regulations of the Departments of the Interior and Agriculture concerning the wheeling stipulation allow unilateral action by the Secretary of the Department of the Interior in his determination that surplus capacity exists in a given transmission facility. This surplus capacity can then be used by the Federal Government to move scheduled power over such line without recognizing the emergency and/or reliability considerations involved in the construction and operation of the transmission line. The administrative regulations do not, therefore, appear to recognize the reality and complexity of interconnected system operation and are not compatible with reliable operation of such systems.

Another potentially hazardous condition in the "wheeling stipulation" is the 36 months notice requirement in the recapture clause. Once the decision has been made to wheel scheduled power over a line that is determined to have surplus capacity unexpected variations due to changing system conditions or delays in putting equipment into operation are not assumed by the Government as its responsibility during this 36 month period. The flexibility the individual utility may have had to meet these unexpected variations is considerably reduced by the Government taking and utilizing the surplus capacity. What was intended by the individual utility as reserve capacity.

Following the Northeast power failure and several similar disturbances, the Federal Government and other political subdivisions have pressed

for increased regulation, additional legislation, and construction of transmission facilities to increase the reliability of the electric systems in the United States. While calling for actions to increase reliability on one hand, the Federal government has imposed regulations which provide that transmission capacity built for reliability and/or emergency interchange purposes can be used for the movement of scheduled power. It appears that if this surplus capacity is ever utilized it could constitute a hazard to the reliability of interconnected electric systems.

The interconnected electric utilities in the western United States and in other areas of the nation are, of course, concerned with system reliability. For this reason, the Western Systems Coordinating Council (WSCC) composed of approximately forty utilities in the eleven western states and western Canada including the Bonneville Power Administration and the Bureau of Reclamation has been established to review prospective major facility additions and changes in operating practices to assure that the reliability of the interconnected systems will be preserved.

Similar Systems Coordinating Councils with the same objectives have been established in other areas of the United States. In order to reach individual or collective reliability objectives, WSCC has recognized that individual systems or groups of systems may decide to build reserve transmission capacity solely for the purpose of providing increased reliability. These decisions are made only after extensive and detailed studies usually requiring many months.

Due to the technical intricasies of Federal power transmission reasonable conditions would seem to specify a limit on the period of time in which Interior has the right to exercise its authority to use a utility's "surplus" capacity, or would provide a shorter time with more assurance that the utility can recapture this surplus capacity. Further, it would be reasonable to expect that the Department of the Interior would have some projections as to the needs of its preference customers. If the projections and requirements of both the utility company and the Department of the Interior could be known in advance, this would seem to set reasonable limitations and provide a basis for obtaining contractual agreements between the utility company and the Department of the Interior. Although regulations provide for such agreements in lieu of the signing of stipulations, they are of a compulsory nature and no standards or limitations are established. While the Secretary of the Interior has indicated that the regulations are

required to force the utility companies into contractual arrangements, the Federal Power Commission has not deemed it necessary to ask Congress for the authority to promulgate compulsory interconnections with private utility transmission lines:

> At that time the Commission majority felt that, pending completion of the National Power Survey (scheduled for the end of the present calendar year), it would be premature to express a judgement as to whether compulsory provisions should be added to our present authority to encourage voluntary interconnection and coordination. In the light of further consideration of the problem of reconciling the interests of the various segments of the power industry, and at the same time encouraging a sound expansion of the Nation's high-voltage and extra-high voltage transmission facilities, we should be prepared to endorse the objectives of such legislation. 41/

There is no indication that the Federal Power Commission has had any reason to change its position in the 6 years which have transpired since the regulations went into effect. Furthermore, there is confusion as to whether the Secretary has the statutory authority to require compulsory wheeling stipulations. Section 5 of the 1944 Flood Control Act 42/ in designating the Secretary of the Interior as the marketing agent for surplus power generated at dams under the control of the Department of the Army; authorized the Secretary "to construct or acquire" necessary transmission facilities "by purchase or other agreement." This Act, however, does not appear to authorize the Secretary to use his custodianship of the public lands either to prevent utility companies from constructing transmission facilities needed by them to serve their customers or to require such companies to surrender a portion of their capacity to the Department of the Interior. By the terms of the Act, the acquisition by Interior of transmission facilities can be accomplished only by "purchase or other agreement." Since "agreement" would seem to imply voluntary consent by two parties, the Secretary's position that such regulations are necessary to force a utility into contractual agreements would seem to be beyond the authority of this Act. In addition, Congress appears to have reserved the Federal power field for itself. In 1956 the House Committee on Government Operations unsuccessfully urged (84th Congress, House Report 1975) that Congress enact legislation to give the statutory authority for the provisions of the regulations which were repealed in 1954. Similar

bills have been introduced in the 84th, 85th, 86th and 87th Congress. 43/ In each case Congress declined to act on the proposed bills and no such legislation has been enacted. The history of all Acts and bills relating to Federal power seems to show that Congress has decided by the authorization and appropriation process whether Federal transmission lines will be built or whether non-Federal lines will be used to deliver Federal power to preference customers.

9. Criteria for Selection

The criteria for selection of lands for utility transmission lines are not contained in the statutes. Under the Multiple Use and Classification Act of 1964, 44/ however, the Secretary of Interior must develop criteria to determine whether lands should be disposed or retained for various uses. These may include utility type transmission facilities.

The general criteria for all land classifications are stated in 43 C. F. R. 2410. 1-1. While the criterion contained therein appears to be neutral with respect to whether retention for multiple use management is to be preferred or not preferred over disposal, some preferences are indicated in 43 C. F. R. 2410. 1-2 for retention classification and 43 C.F.R. 2410. 1-3 for disposal classification.

Although these preferences are unclear, it would appear that electrical plants and substations can be classified for disposal, while lands for rights-of-way across public lands would be retained for multiple use management. This is evident from the criteria for retention which indicates that retention must (1) further the objectives of Federal natural resource legislation, (2) stabilize the timber industry, (3) preserve public values that would be lost if lands passed from Federal ownership, and (4) protect and enhance established Federal programs. The first and the fourth points would seem to apply to rights-of-way retention for power lines through the desire on the part of the Department of Interior to promote the power-marketing program of the United States as prescribed in 43 C. F. R. 2234. 4-1 (c)(3).

A problem is encountered when Federal agencies, particularly the Forest Service attempts to locate utility lines in a manner that will not detract from scenic values and deplete the timber resource. See Case Study No. 2, Appendix E. Present authority to determine conditions on the construction of transmission lines as expressed in 36 C. F. R. § 25/. 50 does permit the Forest Service to participate

in the planning of transmission lines prior to their encroachment on Forest Service land. Consequently, the selection alternative alignments is limited.

B. Water Transmission and Reservoir Facilities

1. Purpose

Federal lands are available for rights-of-way for reservoirs, canals, and laterals of canal ditch companies, and irrigation or drainage districts. 45/ Further rights-of-way apply for ditches, canals, or reservoirs intended for water transportation, domestic purposes, or for the development of power, as subsidiary to the primary purposes of providing irrigation and drainage. 46/ In all, twelve federal laws authorize the use of public land for transporting water or for water storage. Ten of these laws are pertinent to this study and are discussed in detail in Volume I, Part 2.

In addition, a license must be obtained from the Federal Power Commission (F. P. C.) for multi-purpose water projects involving the development and transmission of power across public lands and over which Congress has jurisdiction under the Federal Power Act of 1920. This act provides broad authorization for the use of public lands for reservoir projects for the improvement of navigation, development of water power, recreation, and "other beneficial uses." 47/ Projects for which F. P. C. issues a license must have comprehensive plans which consider such multiple public uses.

It is clear from a review of the statutes that the purposes for which public lands can be used are broad enough to allow the development of water transmission facilities on Section 10 public lands.

2. Kind of Interest

While there are no statutes specifically authorizing public land disposals for water transmission facilities, disposals of surplus property by the General Services Administration could be used for such purposes subject only to local government ordinances. Similarly, since the interpretation of "public purposes" has been very broad under the Recreation and Public Purposes Act could be construed as including water transmission facilities. It is not clear whether such disposals could occur under the Public Land Sale Act of 1964.

3. Class of Land

Under the laws examined in Part 2, there are no limitations imposed on the use of any Section 10 lands for water storage and water transportation included in the authority under which the land was acquired.

4. Tenure

Part 2 of this report discusses in detail the interests granted under the laws governing rights-of-way for water storage and water transportation use. The ten statutes examined use various terms to describe the interest they create in the grantee. This has been a source of confusion. Eight refer to a "right-of-way", two to an easement.

The language of the Act of March 3, 1891 48/ has been construed as meaning either a mere right-of-way with no fee interest, or an easement with limited fee interest. The latter was held to be the case in United States v. Union Pacific Railway Company. 49/ Although this case deals only with railroads, the language has been construed as applying to water transmission.

In construing the interest conveyed by the Act of January 21, 1895, 50/ in granting the use of a right-of-way, both the courts and the Department of the Interior have termed it a mere license, revocable at the discretion of the Secretary of the Interior.

Regulations administered by the Bureau of Land Management 51/ define "right-of-way" as including "license," "permit," or "easement" with no fee interest of any kind, and specify that "no interest shall be greater than a permit revocable at the discretion of the authorized officer unless the applicable statute provides otherwise."

If an interest is construed as a license and revocable at any time, the tenure provided would appear to be inconsistent with the high capital investment normally associated with water development. Whichever of the various terms is used for definition, however, the interest appears to imply that the right to use the land for the purpose granted will revert to the United States only on cessation of its use for the authorized purpose. Consequently, as a practical matter, the tenure conveyed would appear to be consistent with the use or the investment. There is no provision made in the statutes, regulations, or policies for compensation to users upon termination.

5. Qualifications

No apparent problems arise regarding the qualification of applicants under the acts authorizing use of public lands for water transmission purposes. These statutes allow the granting of rights-of-way to public bodies, citizens, associations and corporations.

6. Acreage Limitations

The maximum amount of land over which a right-of-way for water storage or transportation is obtained under the statutes differs from act to act. Neither act reserving rights-or-way to the United States, 52/ contains any restrictions on the amount of land which may be obtained. The Act of 1891 53/ and those acts to which its provisions apply 54/ each limit the size of a reservoir site right-of-way to the ground occupied by the reservoir plus 50 feet on each side of its marginal limits. Likewise, all limit the size of water conduit rights-of-way to the ground occupied by them plus, in the first two of these acts, 50 feet on each side of their marginal limits, and in the case of the last act, 50 feet on each side of the center line of the conduit. This right-of-way, however, appears ample for these purposes, since the amount of land to be occupied by the reservoir is flexible.

7. Charges

Department of the Interior and Agriculture policies to grant no charge rights-of-ways to encourage projects of permanent nature for public benefit may be more than offset by Federal Power Commission annual license fee. Inconsistent policies of Federal agencies which both encourage and discourage the identical projects through the imposition of below market rates for rights-of-way, then license fees, then loans or grants, create problems, confusion and tend to destroy public confidence in Government programs.

The statutes authorizing rights-of-way for storage or transportation of water do not specify an amount to be charged, nor is there mention of a right to charge for such purposes. Decisions of both the Department of Interior and the Attorney General, however, have established the right to make reasonable charges. Accordingly, Department of Interior regulations 55/ specify that no charge will be made for a right-of-way authorized by the Act of 1891 56/ and those acts to which its provisions were subsequently extended 57/ for lifestock reservoirs 58/ or where the grantee is a federal agency or the use

exclusively for irrigation projects, municipally operated projects, nonprofit projects or Rural Electrification Administration projects. Where the grantee is a private party, the regulations prescribe a minimum charge of $25 per right-of-way, permit, or easement per five-year period but no less than the fair market value of the grant as determined by appraisal by the authorized officer, who may require in advance a lump sum or periodic payment. 59/

It appears that the exemption of public bodies from a charge was for some public purpose. There is no way to determine, however, what effect the no-charge policy has had on the attainment of a public objective. While no charge is levied on a public body, such as a state water project, for a right-of-way by either the Department of Agriculture or of Interior, a license fee prevails on all projects under the jurisdiction of the Federal Power Commission.

Although no particular problems have arisen from this pricing policy, at least two problems are evident relating to annual fees on projects of extended duration. For example, the California Department of Water Resources pays the Federal Power Commission a license fee of $2.50 per acre on 30,000 acres of public land, amounting to $75,000 annually. A major water project of this type by its very nature indicates permanency of land use and is, for all practical purposes, a disposal. As such, an annual charge made in perpetuity could eventually become inequitable. Moreover, annual levy on such projects creates a needless volume of bookkeeping. A one-time fee, therefore, would appear to be the only justifiable pricing policy in such cases.

Further, there is an inconsistency among Government programs in respect to charges. While the Federal Power Commission levies an annual charge, Federal monies are disbursed as outright grants for construction of needed water projects.

8. Conditions

No conditions imposed on the users of public lands have failed to protect the public interest or to provide needed water transmission facilities. Licensing requirements of the Federal Power Commission insure benefits beyond development of water and power, including recreation and fish and wildlife enhancement. Moreover, in addition to provisions for protection of the land, the Forest Service requires, under the authority

of Section 4 (e) of the Federal Power Act, that the licensee construct, maintain and operate or arrange for the construction, maintenance and operation of recreation and fish and wildlife facilities on such land. 60/

Sometimes additional costs have been incurred as a result of these conditions. In the case of the California Department of Water Resources Aqueduct Project, these Federal requirements have resulted in increased capital construction outlay for improvements beyond those required by the state act authorizing the project. This state measure, the Davis-Dolwig Act, requires that the Department of Water Resources acquire and merely plan for optimum recreation development. The Forest Service and FPC, however, require a commitment for actual construction of recreation facilities.

The extent of these improvements requiring construction of recreation and fish and wildlife facilities are negotiated between the Forest Service and the Department. While increased development costs to the Department cannot generally be quantified, the negotiations themselves are said to require a great deal of time and manpower. Consequently, the costs of obtaining the right to use National Forest lands have, under some circumstances, been greater than the cost of purchasing privately-held lands.

In the absence of a formula for quantifying the additional cost incurred due to the imposition of these conditions it is difficult to assess the financial impact, and since the Forest Service conditions appear to achieve the stated purpose of providing for recreation and fish and wildlife benefits, no modification of these conditions can be suggested.

9. Criteria for Selection

The criteria for selection of lands for water transmission facilities are not contained in the statutes. Under the Multiple Use and Classification Act of 1964, 61/ however, the Secretary of Interior must develop criteria to determine whether lands should be disposed or retained for various uses. The criteria developed under this act to determine whether lands should be disposed or retained is applicable only to the public lands described in the act. These may include water type transmission facilities to be disposed of under the Public Land Sale Act of 1964 as indicated in the discussion of Kind of Interest above. In the case of the Forest Service the policy is to retain lands for reservoirs and to utilize them for recreation development to the maximum public benefit.

The general criteria for all land classifications are stated in 43 C.F.R. 2410.1-1. While the criterion contained therein appears to be natural with respect to whether retention for multiple use management is to be preferred over disposal, some preferences are indicated in 43 C.F.R. 2410.1-2 for retention classification and 43 C.F.R. 2410.1-3 for disposal classification.

Although these preferences are unclear, it would appear that water transmission facilities on Bureau of Land Management land can be classified for disposal. However, there appears to be a desire to retain for multiple use management lands for rights-of-way across public lands. This is evident from the criteria for retention which indicates that retention must (1) further the objectives of Federal natural resource legislation, (2) stabilize the timber industry, (3) preserve public values that would be lost if lands passed from Federal ownership, and (4) protect and enhance established Federal programs.

The criteria to classify land for retention is, of course, tied to the public benefits derived from protecting scenic values and preventing environmental deterioration. There is a benefit to be derived by the general public under such retention that could not be assured under disposal or private market allocation.

III. COMMUNICATION FACILITIES

A. Purpose

There are no statutes limited solely to use and occupancy of Federal lands for communication uses. The applicable statutes authorize communication uses along with other kinds of uses, generally rights of way for various purposes. These statutes are discussed in the preceding Section II in connection with electric power uses. The Act of 1901 62/ authorizes the Secretaries of Agriculture and Interior to issue regulations to permit the use of rights of way through the public lands, forests, reservations, and certain named national parks for poles and lines for telephone and telegraph purposes. The 1911 Act 63/ differs slightly in that it also provides for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities. In 1952, the Act of 1911 was amended to permit rights to be granted for microwave radio relay facilities. 64/ There is no explicit authority for obtaining such facilities under the earlier statutory provisions. 65/

B. Kind of Interest

Despite the permanent character of communications lines there are no statutory provisions expressly providing for disposal of public lands for communication uses. As a consequence use and occupancy is the only interest held by the communications carriers. The interest in the public lands underlying these rights of way is either retained by the Federal Government or held by the subsequent patentees.

C. Class of Land

Federal lands that are sensitive to scenic values, such as National Parks and wilderness areas, are generally protected with greater restrictions on rights of way for any and all transmission lines. Although public land users of these areas experience additional costs for rerouting, there appears to be a cooperative atmosphere with respect to protection of scenic public lands. There appears to be no basis for suggesting changes in the existing policy.

D. Tenure

The Act of 1911 authorizes communication uses for a term up to 50 years. This presents a problem for common carrier communications users because the facilities they install generally have a life span greatly in excess of 50 years. At present the industry is faced with problems related to renewal of these easements. Subsequent to the original granting of the easement the government has in many instances patented the underlying fee to private individuals. In such cases, the government claims it cannot now renew the easement as the land is no longer theirs. This forces the industry to pay whatever price the individual owners demand, or forfeit their use and occupancy of the right of way. The communications industry has recommended that the statutes and regulations providing use of Federal lands by common carrier communications facilities be revised to enable granting of permanent easements. The statutes should provide that "title to such lands shall revert to the United States in the event construction is not commenced within five years or in the event of nonuse for two years after construction is completed or if such use is abandoned." 66/ As noted in the industry's Position Statement, 67/ the most recent legislation on this matter supports their position, by authorizing the granting of permanent easements over Indian lands (not included in Section 10 lands but a part of the public domain), 68/ and over real property of the United States. 69/

E. Qualifications of Applicants

The Acts of 1901 and 1911 authorize use of public lands for communication purposes by citizens, associations or corporations of the United States. In general, there are no problems experienced by the communications common carriers with relation to their qualifications as applicants for use of Section 10 lands.

F. Acreage Limitations

There are no limitations as to acreage which affect the use of public lands for communication transmission lines. A problem does arise, however, where microwave radio relay sites are concerned. Although the 1911 Act was specifically amended to authorize Federal agencies to grant land areas up to 400 square feet to a single communications user as a microwave radio relay site, 70/ they have been unable to take advantage of this benefit in many cases. For example, if a communications user determines that for reasonable security of its facilities and for planned expansion it will require an area 200 feet by 200 feet and applies to the Bureau of Land Management for such area, the authorization of such use granted by the Bureau is non-exclusive and is limited to the area actually occupied by present microwave radio relay facilities. Consequently, if the initial facilities do not occupy the total area requested, the Bureau will grant use of the as yet unoccupied portion of the site to other persons (e.g., television broadcasters, CATV companies). The resulting problems faced by the original applicant user are:

(1) Frequently they are precluded from maintaining adequate security for their facilities;

(2) When expansion becomes necessary, they are put to great unnecessary expense because other users have subsequently located immediately adjacent to their facilities. In fact, the technical problems often encountered are of a magnitude to preclude their ability to expand;

(3) Many times, 40% or more of the entire cost of an initial microwave radio relay installation is the cost of constructing a year-round maintenance road and power line to serve the site. Such expenditure without the security of having additional land necessary for normal expansion is unreasonable.

G. Charges

Fees for communication uses and the basis for determining them vary upward from free use, depending on the nature of the user, the use and the Federal agency with jurisdiction over the land. 71/ Free communications use of public lands is confined to public agencies and companies using Rural Electrification Administration loans thereby eliminating most common carrier communications companies. Various Federal agencies determine charges for the same type of use of Federal lands by different and inconsistent methods even though the authorization arises from the same statute. In addition, Federal agencies use different bases for determining charges depending on the type of facilities placed upon the land even though the purpose is the same and no statutory basis for such differences exists. As a consequence, a single communications line (consisting of telephone poles, underground cables, and/or microwave radio relay station) traversing Federal lands under the jurisdiction of several Federal agencies would be subject to charges determined by each agency using many different methods even though the basic use and the authorizing statute are the same.

Other inconsistencies in charges made by Federal agencies for communications uses of public land relate to the method of determining the "fair market value of the land." For example, while the Bureau of Land Management correctly assesses charges for pole lines and underground cables based on fair market value of land, subsequent users of the same right of way are charged the same total amount as were the original users. Furthermore, there is no adjustment given the original user, even though the increased burden on Federal land is negligible. In another example, the Forest Service charges for microwave radio relay stations are based on the value of the investment rather than the value of the land. 72/

H. Conditions of Use

One of the very basic problems encountered by the communications industry is related to the lack of uniformity of applications for use of public lands. Additionally, terms and conditions of use, and survey requirements differ among the various Federal agencies. This lack of uniformity results in unnecessary waste of time and additional expenditures to both the user and the Federal agencies. A recent example of these extra costs arose near Ely, Nevada, involving Federal lands administered by several Federal agencies. Each agency had its own form of application requiring maps of differing scales. The extra costs in this case amounted to several thousands of dollars even though the total rental per agency was less than $50.

In many instances conditions imposed on use of Federal lands for the required access roads to the transmitting facilities are unreasonable and inequitable. For example, the Forest Service usually requires that access roads to microwave radio relay sites be constructed to standards far exceeding the users requirements. The user is then expected to maintain the roads and assume full liability insurance even though the road is used by the general public, the Forest Service and/or subsequent patentees of the land. This they must do without compensation from other users of the access roads.

Another conflict based on conditions of use arises with respect to unpatented mining claims. A condition of the granting of a right of way is that it be "subject to valid existing rights." The problem arises in the following manner: Although a diligent search of records will not reveal a claimant, one will appear after construction on the communications lines has begun. The claimant, asserting that he has an unpatented mining claim, will establish that he filed a proof of labor with the County Recorder between the date of the communications user's survey for the line and the date of the decision by the Federal agency granting the right of way. The resulting contents will be generally not be adjudicated by the Federal agencies even though the claim may be illegitimate. "The Bell System endorses as being in the public interest the Study recommendation that unpatented and unrecorded mining claims be invalid against a subsequent grant of a right of way if not registered with the Bureau of Land Management. (Study, Appendix F-7)." 73/

I. Criteria for Selection

Criteria for selection of lands for communication facilities are not contained in the statutes. In accord with the principles of the Multiple Use and Classification Act of 1964, 74/ most utility companies and Federal agencies are in agreement that conservation of public lands by means of a common corridor for utilities is in the public interest. It should be pointed out however, that the Bureau of Public Roads has made recent attempts to preclude utilities from placing their facilities along federally assisted highway rights of way. 75/ If this action is enforced, it will be in direct conflict with the policy of multiple use.

IV. RESIDENTIAL USES

A. Vacation Home Use

1. Purpose

Federal lands are available for vacation-home use. While there are no legislative or constitutional limitations on the use of public lands, for vacation-home use, there are policy limitations imposed by Federal agencies. Since over 95 percent of the number of vacation home sites are in Forest Service land, this analysis is concentrated on the policies of the Forest Service.

Federal land laws do not specifically designate or exclude disposals for vacation homes use. It is apparent that a vacation home could be construed as a residential use under such disposals.

The initial objective of vacation-home permits on national forests was to attract the general population to the forest for recreation use and enjoyment of the resource. The present Forest Service policy, however, is to hold this private recreation use as the lowest-priority recreation use permitted. Three higher priorities are assigned to the types of uses that will yield more public recreation benefits. Vacation-home permits do provide for an additional recreation use of the national forests and other public lands without loss of public recreation benefit and without harm to the land as long as they are accepted and administered as an interim use, until the areas are needed for higher-priority purposes.

2. Kind of Interest

The kind of interest that can be granted in the case of disposal of lands for vacation home use excludes productive uses that could otherwise be made of the land by the general public. Such disposals would be in direct conflict with public recreation use of the land.

Further, the policies between agencies; i.e., Forest Service and the Bureau of Land Management, are in conflict. The Forest Service prefers to retain these sites while the Bureau of Land Management disposes of sites which could be used for vacation homes.

According to existing Forest Service policy, vacation-home permit sites can be terminated when it is determined that they are needed for higher-priority recreation use to serve a larger segment of the general public. This upgrading of use without disposal of the land, appears to be in the public interest.

However, the Forest Service also has a policy to dispose of vacation-home sites in some situations through land exchanges. Disposal of the sites by land exchange results in private ownership of these choice sites and the common areas between sites. The common areas may represent about 200 percent more acreage of equally choice land than the vacation-home parcels themselves. The exchange program has resulted in the disposal of choice acreage of Federal land that has been devoted to vacation homes for larger acreage of poorer quality land having fewer or no amenities for recreation use. When this happens there is a permanent loss of public benefit and public recreation in choice areas.

The exchange law 76/ states that the exchange must benefit the public interest, that the land received must be valuable and desirable for National Forest purposes, and must be within forest boundaries. However, there is no provision for equating the parcels exchanged on the basis of quality for recreation use. Consequently, in applying the exchange provision to vacation home use choice lands needed for present or future recreation use by the general public may be lost.

The benefactors are private individuals who will use the land for private purposes, and not necessarily continue a recreation use.

3. Class of Land

The question of class of land is not applicable to vacation-home sites on Federal land, as authorized by Special Use Permits under the Act of June 4, 1897, and the Act of March 4, 1915. The authority under which land was acquired does not limit disposals for vacation home sites.

4. Tenure

The tenure as presently provided is not consistent with the use to be made of the land and related investment. Present policy of all agencies permitting use allows much more time than is necessary to amortize the investment in a vacation home improvement. Tenure should be tied to the cost of the improvement; such is not the case, however, under present Forest Service policy.

Permits for vacation-home use have, in most instances, been issued as terminable permits with year-to-year renewal, but with no stated minimum or maximum term. Actual tenure of sites has ranged to 50-plus years with policies for extensions that may add up to another 30 years.

In practice, terminable permits have been terminated only if the site was needed for higher public use, -- either higher-priority recreation use or other higher public use such as highways, dams, or facilities in the nature of a public utility. Although permittees had no definite tenure stated in the permit itself, most of them indicate that they construed tenure to be for 99 years or in perpetuity as long as they met the occupancy conditions and rules.

Failure to specify at least a minimum or maximum tenure for a site is inconsistent with recognized good business practices, and it is a deterrent to the permittee's understanding of the need to amortize the cost of his improvement over the specified term.

The average cost of a vacation-home improvement is reported by permittees to be $6,800. About 63 percent indicate that their vacation-home improvement cost $7,000 or less. If the cost of the improvement is amortized on a reasonable basis of say $25 per month for the recreation use of the facility, then a term of 25 years would be adequate to cover an investment of approximately $7,500.

As a further reference to length of tenure which might be considered acceptable for a recreation-residence use, 30 to 35 years is accepted by the Internal Revenue Service as a reasonable period for amortizing a residence of wood construction. As an average, then, 25 to 30 years should be an acceptable term of occupancy for vacation-home use.

A 25-year or 30-year term, permitted by law, would be adequate for the use of a site for this purpose, not only from the standpoint of amortizing cost, but also from the standpoint of the life cycle of an individual permittee. Most people are financially unable to acquire a second home until they are at least 35 to 40 years of age; if they are permitted to hold it for 25 or 30 years, they will have had an opportunity to use it and enjoy it until age 65 or 70.

A 25-year or 30-year term could provide more flexibility of supply of sites for reuse, especially if the termination of permits were phased so that 20 percent expired at each 5-year interval. Government planning would be facilitated, public uses could be better served, and permittees would have a specific and adequate occupancy on which to plan.

The guidelines in the law, regulation, and policy do not favorably compare with business and lending institutions as acceptable tenure-investment relationships.

Most public and private agencies which lease land, lease only for commercial purposes. This gives a lessee an income-producing opportunity that will justify the lease rent and the cost of the improvement required to carry on the prescribed use. Most lending institutions will finance improvements on leased land only if the income-producing potential of the business during the minimum term of the lease is sufficient to amortize the investment cost, financial service charges, and normal operating costs. The amortization of the investment is accounted for by depreciation of the improvement which is an allowed cost of doing business. Lending institutions will not finance an improvement if the term of the lease is not adequate for amortization of the improvement.

A terminable permit, on a year-to-year renewal basis, would not be adequate to obtain financing of the improvement. An improvement on leased land which would not be income-producing or provide permanent occupancy and thereby replace rental expense, would also present financing obstacles.

Public and private agencies which lease land for commercial use determine the term of a lease on the basis of the cost of the improvement required; e.g., 10 years or less if the improvement costs less than $250,000; 15 to 25 years if the cost of the improvement ranges from $250,000 to $500,000; and 50 years if the cost of the improvement is $1,000,000 or more.

Private leases on vacation-home sites range from 10 years to 99 years, with the longer ones usually not interferring with the land owner's other activity and use of the surrounding premises. The maximum of 30 years allowed by law for a vacation-home permit on Federal land should be adequate, although it may not be conducive to financing because of the luxury-type, nonincome aspects of the allowed use.

Since many permittees apparently do not understand the problems of financing a vacation-home improvement and their obligation to absorb the amortization of that improvement (just as they absorb the depreciation of an automobile), the prime need relating to guidelines for tenure-investment relationships is an information program to help potential permittees understand the financial factors of building an improvement on leased land, including the loss of the improvement at the end of the term, when the site is recovered by the Federal Government.

Compensation to users upon termination of a vacation-home site is justified only when termination occurs prior to expiration of the term provided in the permit.

This is a normal provision in private leasing as well as in Special Use Permits of the Federal Government. Holders of terminable permits, however, assume that the annual renewal provision of their permits is equivalent to a 99-year term. Even when they are given a 10-year notice of intent to terminate after many years of occupancy, they do not seem to understand that they have occupied the site for a full term and are not entitled to compensation for their improvement.

Holders of term permits have entered into an agreement with the permittor at the time the permit was issued on the maximum value that can be reimbursed for the improvement in case of termination before the expiration of the specified term. This maximum value is determined to be the replacement value at the time of issuance of the permit. At normal termination of the permit no compensation for the improvement is authorized.

Legislators have indicated a similar lack of understanding regarding compensation for improvements when the full term specified in a permit has been fulfilled before termination of the site. Laws have been proposed to compensate for the improvement regardless of the term fulfilled, thereby obligating the Government and the general public after normal occupancy of a site has been completed.

The compensation provided for in the early termination of term permits is based on replacement value, while in standard leasing practices the compensation is based on the cost of the improvement, prorated for the number of years of the specified term which were not fulfilled. The costs in this case could not be depreciated. This basis would be more equitable to the Government and to the general public, especially in an economic environment of inflation, where replacement value exceeds depreciated cost.

Vacation home permittees have pressured the Federal Government for long-term occupancy and even acquisition of the sites through land exchange programs, litigation, and other means. Such occupancy or acquisition deprives the Government of flexibility in reuse of the sites, deprives the general public of present access to the sites for public recreation use and may deprive the general public of retention of the sites for the use of future generations.

5. Qualifications of Applicants

There are no required qualifications of applicants for vacation-home use specified in the laws, regulations or policies.

When vacation-home sites were available, the requirement that a permittee construct a recreation residence in order to use the site for the purpose allowed, automatically limited applicants to those who could afford such an improvement. However, that requirement was compatible with the planned use of the land. And the cost of the improvement could be minimized by application of personal labor and by cabin-type construction rather than all-year construction.

Although the nominal fee charged for early permits (1910 to 1930) was not a restraint on applicants, great distances and poor access tended to restrict the opportunity to middle and upper-income families. Applicants were further restricted by two other factors; (1) the lack of supply of new sites, and (2) the policy of not recovering existing sites for reoffering on an equitable and random basis. Because of these restrictions, permits may only be acquired by those who are willing and able to pay a premium price for the existing improvements in order to acquire a permit. People who can afford to make such purchases are usually high-income people. These people represent 60 percent of total permittees sampled.

6. Acreage Limitations

The size of a site assigned for a vacation private home under a Forest Service or National Park Service, Special Use Permit is adequate, and is comparable to privately owned parcels devoted to the same use. While the sites are generally about 1/4 acre, buffer areas between sites and between other intensive use activities often increase the effective area.

The limitation of acreage for vacation home use is reflected only in the inability to increase the total supply of sites. No new tracts of summer home sites have been brought onto the market or even authorized for over 10 years, yet during this time recreation demands have greatly increased. The policy of not recovering present sites at the end of the maximum term of 30 years and reissuing those sites to new permittees is inconsistent with the limitation of acreage for this use.

7. Charges

The prices charged for vacation-home sites on Federal lands have, over the long term, been nominal, substantially below market value.

This price concession has served to increase demand beyond the limit of supply. This fact, coupled with the existing practice of virtually unlimited tenure, has contributed to a speculative market for vacation-home improvements. The premium paid for the improvement, frequently amounting to several thousand dollars over the appraised value of the improvement, can be considered as the market value of obtaining a permit in a scarcity situation. The turnover rate for vacation homes is estimated by Forest Service field offices to be 10 to 15 percent annually. Subsequent resales have continued to bring higher prices than previous sales of the same improvement. It is believed that the step taken prior to 1967 to adjust permit fees upward, comparable to fair market prices, will tend to reduce demand for vacation home sites on public lands. This effort will not make fees current with fair market prices, however, for at least five years. This rate adjustment program is being phased over 5 years, in order to make them more palatable to permittees. While this phasing of the rate increase is an obvious benefit to permittees, no general public benefit can be derived from having permittees pay less than fair market value. The lower the price, the greater the tendency for people who cannot afford the annual amortization of the improvement cost to participate in the vacation-home permit program, thereby generating future problems.

During the early years of vacation-home permits, in the decades from 1910 to 1930, very nominal fees ($10 to $15 per site per year) were offered in order to attract people to become acquainted with the forest, enjoy the recreation opportunities, appreciate the resources, and support conservation.

This low rate was applied to overcome the obstacles of poor access, lack of transportation facilities, and a limited mobility of the population.

The extent to which the Government (and therefore, the general public) was subsidizing the program of (1) bringing permit sites on to the market and (2) of administering the sites, is not known. It is believed, however, to have been substantial. Long after the objective was accomplished and sites were no longer available, the fees were not adjusted upward to fair market prices until directed by the General Accounting

Office in 1963. The 5 percent of fair market value appears to be in line with private practices, although some private rates are based on 6 percent; this is generally due to the more serves offered in private developments.

The policy of low fees introduced to accomplish the objective of extending the use of the forests to private recreation residences was construed by permittees to mean that low fees would always exist. This policy coupled with the lack of a formula or specification in the permit for increasing fees as costs increases has resulted in pressures from permittees to rescind these higher rates.

This change in fee structure to higher levels more nearly in line with fair market value has created a problem for those permittees who cannot afford the luxury of a vacation home at fair market rates, and it has simultaneously introduced a leavening factor for the future which encourages potential permittees to evaluate leasing versus purchasing of land for a vacation-home.

8. Conditions

Conditions governing certain aspects of the Forest Service and National Park Service vacation-home programs has resulted in a problem in providing for the general public recreation on public land. In this respect, the vacation-home program has failed to protect the public interest.

The major objectives in leasing land is to retain ownership of the land, control the use of the land, recover the occupancy of the site for reuse at the end of the leasing period, and secondarily to derive adequate income from the land during the leasing period to cover the cost of leasing and a rent from the land. Authorization of use of Federal land by Special Use Permits for an interim use as vacation-home sites in general accomplish the objectives of leasing.

The conditions imposed in Special Use Permits, however, have not always been adequate to meet these objectives or to avoid problems during the interim use period. Consequently, this has contributed in three ways to the problems besetting the vacation-home program.

First, there is no guarantee of retention of ownership of the land for conversion to general public use. As a response to pressure for the Government to self-existing vacation-home sites, a program of land exchanges has been initiated. This often leads to the disposal of

choice recreation land in exchange for land of less value for public recreation use. The more indeterminate the tenure through lack of a specific term for a site under permit, and the longer the occupancy is permitted under indefinite tenure conditions, the greater the tendency and pressures by permittees to retain occupancy and/or to acquire the land. If the land is retained but not recovered on a definite schedule for reuse at the option of the owner, the permittee tends to assume more occupancy privileges.

Second, no program has been implemented to recover vacation-home permit sites on a continuing basis at the expiration of a normal period of occupancy. Absence of a specified term of occupancy in permits when first issued provides the basis for this problem. The present Forest Service policy of continuing extensions even in term permits is magnifying the problem of recovery of sites. Failure to tie a term of occupancy to a site rather than to an individual permittee has further complicated the problem. The program of extensions of tenure appears to have been designed to satisfy each individual permittee without adequate consideration of Government needs to recover and reuse sites and without adequate consideration of the interest of the general public in either the rotation of sites to new permittees or in the development of public recreation areas and facilities.

Third, the absence of a definite stated tenure has burdened the Government with a promise of giving 10-year notification of intention to terminate sites. This has reduced the flexibility in acquiring sites for reuse to meet demand for public facilities. The lack of a program which would phase terminations uniformly over a period of time appears to have further limited the efficiency of planning reuse. In addition rate structures to adequately cover the cost of leasing, administering, and holding the land during the term of the permit were not provided the permittee. Adjustments are now being made to bring fees in line with fair market value within 5 years after appraisal. However, no cost accounting system is in existence to determine if the rates charged are adequate to cover costs.

Most of the problems arise from absence of conditions rather than conditions imposed on permittees. Failure to set a precedent for recovery of sites on a regular basis and for retention of ownership of choice land has resulted in failure to provide the use of this land for public recreation benefits. In addition, failure to spell out adequate and specific conditions (particularly tenure and fees) within the leasing document has resulted in requests for verbal interpretation of conditions, a problem for permittees in understanding their rights and obligations, and has given rise to litigations and hearings.

Special Use Permits issued for vacation-home sites limit the use of these parcels and the improvements built on them to private recreation residences. They are not to be used as full-time residences to the exclusion of a permanent home elsewhere. This condition and this limitation on use are compatible with the prescribed use of the land for recreation-oriented activity. Enforcement of this limitation appears to have been successful in 95 percent of the cases. However, 5 percent of permittees according to the mail survey report they occupy their vacation home as a permanent residence. Pressure is mounting to permit permanent occupancy, particularly for retirement living. Thirty-eight percent of permittees indicated an interest in permanent use of their vacation home, but such an extension would not be compatible with the policy of recreation use. Rather, it would tend to generate service problems, and could make recovery and retention of the lands for public recreation use more difficult.

9. Criteria for Selection

The criteria for selection has resulted in allocating land to occupancy use different from that which would occur under private market allocation.

In the past some private recreation residences were permitted on sites which are now or soon will be needed for public recreation use of a higher priority. The choice sites near lakes or river frontage were the first requested by permittees during the early stages of the program. As long as these sites were not needed to meet public recreation requirements, it served a public benefit to a selected few to allow these sites to be used for private recreation. An even greater public benefit was served in the retention of ownership of these sites so that they could be reused for public recreation when needed. In a private market, public access to choice waterfront locations would undoubtedly not have been protected. In some instances, commercial use would have replaced residential or recreation use of the sites. It is conceivable however, that sites could be selected which would not conflict with potential public recreation use.

Further, assuming that a policy of recovery and reuse will be implemented as needed to meet the growth in public demand for the use of these resources, the interim use can be made of many sites without interference with the best, long range most beneficial use of the site for public recreation.

10. Additional Critical Features

The lack of a cost accounting system to determine financial feasibility of vacation-home permits limits policy determination and fee determination.

From the initiation of the program there was no stated objective of whether the income from vacation-home permits should cover the cost of bringing the sites into use, the cost of administering the permits, and the opportunity costs (value of other opportunities foregone). The low permit fees which were offered initially to attract permittees, and which remained in effect until approximately 1960, are believed, by the administering agencies, not to have covered these costs. In fact, whether the income from the current, higher fees cover the cost of administering the permits, and the cost of management time devoted to this use at higher policy levels, is questioned by the agencies themselves, but cannot be verified for lack of a cost accounting system.

If the general public is restricted from the use of the recreation opportunities at these sites, and at the same time is subsidizing the cost of bringing the sites into existence and the cost of managing the sites year-after-year, this knowledge should have a distinct bearing on policies for continuing this use and for fees charged, maximum tenure permitted, and recovery of the land.

Also, an appropriate cost accounting system could determine if the program was being subsidized, and would reflect any unfair competition for owners of similar private lands who cannot afford to develop their properties for the same purpose without subsidies. This is a registered complaint from private owners, but there is not adequate knowledge of costs to offer a corrective policy.

Administration of the recreation function may need to be coordinated by one agency.

The Forest Service, which is administering over 99 percent of the permits for private recreation residences, as well as other recreation uses of National Forests, manages all of the resources under its jurisdiction under policy of multiple use designed to achieve the greatest benefit for the public. It is not concerned with forestry alone.

Those forest lands which are suitable for recreation use may be better managed for that one use by an agency which has the total responsibility of coordinating recreation use of Federal lands, perhaps the National Park Service. Such a change in the administration of a special purpose

use may avoid disposal of lands suited for this purpose, as was noted in the land exchanges effected for vacation-home sites.

B. Other Residential Uses

There are no laws which relate exclusively to the retention or disposal of public lands for residential uses. Statutes pertaining to residential uses are inclusive of commercial, industrial and other uses normally associated with the expansion of existing or new communities. Consequently, a discussion of the problems pertaining to the retention or disposal of this particular use is examined below under "Urban Occupancy of Lands for New and Expanding Communities."

V. COMMERCIAL AND INDUSTRIAL USES

See discussion of problems associated with new and expanding communities.

VI. COMMUNITY FACILITY RELATED

See discussion of new and expanding communities.

VII. NEW AND EXPANDING COMMUNITIES

Uses which are discussed in this section include uses which are normally found in new communities or the expansion of existing communities. These include residential uses, commercial and industrial uses, and community facility related uses. This is not a detailed discussion of each provision cited. Details of these various statutes cited and relevant statutes of lesser importance are contained in the Part 2 of this study. With regards to utilizing public lands adjacent to those expanding communities examined in this study for such uses as utility lines, roads, dumps and temporary structures, investigation revealed no variance between the extent of the use of Section 10 lands versus other adjoining lands. The only pressure to obtain Section 10 lands comes from the desire to obtain land for public purposes at $2.50 per acre under the Recreation and Public Purposes Act. In the case of utility lines, efforts have been made to avoid public lands in order not to have to comply with wheeling stipulations.

A. Purpose

Federal lands are available for new towns and new communities. There is no constitutional limitation on the use of public lands for new towns or the expansion of existing communities. The U.S. Const. Art. IV, Section 3, cl. 2 provides that "Congress shall have power to dispose of...territory or other property belonging to the United States...." Over the years, the Congress has used this power to dispose of lands as a subsidy to hasten development of the country, to gain needed revenue for the Federal Government and to secure the nation's frontiers. The Congress could well decide that public lands should be made available for different purposes, such as providing new town sites to change the pattern of demographic movement within the country and for alleviating the pressures and burdens caused by mass movement into the older cities, particularly the large metropolitan cities.

While there are other statutes which would generally permit the use of public lands for new and expanding communities, the broadest authorization for such a use of lands is also the most recent authorization. Under the Classification & Multiple Use Act of 1964 77/ the Secretary of the Interior is to develop regulations containing criteria as to what lands should be disposed of or retained. On the basis of the criteria, he is then to classify lands as suitable for disposal or for retention. 78/ The lands to be disposed of are those that are required for the orderly growth and development of a community, which would probably include lands available by way of annexation to old communities, and lands

that are chiefly valuable for residential, commercial, agricultural, industrial, or public uses or development. The lands classified in latter manner would appear to be those lands available for new community development.

It is not clear under the statutes whether lands classified for retention 79/ could be made available for the kinds of urban uses typically present in new communities. Retained lands can be used for such purposes as industrial development, occupancy, and preservation of public values that would be lost if the land passed from Federal ownership. These purposes are defined in 43 C.F.R. § 17253-3 broadly enough to permit urban type development. As a result the development of new communities could probably occur on retained public lands.

In any case whether Section 10 lands should be disposed of or retained is the fundamental policy choice of this study. It has frequently been urged the Government should be in the urbansite development and management business. 80/

There is additional Federal legislation, although designed for an earlier era, which might be compatible with limited new and expanding community development. This is the so-called townsite legislation. The townsite legislation authorizes the president to designate, occupants to plot, or a trustee to enter, in order to establish a townsite. 81/ This authority concerns public lands. Separate legislation authorizes townsites on reclamation lands 82/ and on national forests. 83/ Such authority is broad enough to include new communities or the expansion of older communities. The statutory pattern expresses a policy generally favoring extraction of minerals from lands though the same lands are within a townsite. 84/ The fact that a title to minerals or the right of their possession may be in persons other than those acquiring title to the townsite, as is true under these statutes, is not necessarily incompatible with urban development. There is much urban development in areas where the owners and users of surface rights do not own the mineral rights.

However, 43 U.S.C. § 728 states that "the title to town lots shall be subject (to mineral rights) and the necessary use" of these rights "and the surface ground appertaining thereto." Even though it appears that the right to disrupt surface uses by the exercise of mineral rights applies only when the mineral rights are valid and pre-exist the title given the town, 85/ if the exercise of mineral rights cannot be controlled through the use of the police power, such as by zoning, the town may be divested of an important control over urban development. While the power of a townsite municipality to control the exercise of mineral rights through such a device as zoning has apparently not been litigated, the courts have not generally been disposed to allow mineral claims to disrupt other residential and business uses. 86/

There are other provisions of Federal Law which permit urban-type uses to be made of public land. For example the Small Tract Act 87/ permits the Secretary of the Interior to sell or lease lands which the Secretary classifies as chiefly valuable for residence, recreation, business, or community site purposes. The lands cannot be sold or leased if they would unreasonably interfere with the use of water for grazing purposes or unduly impair the protection of watershed areas. The latter kind of provision under which nonurban uses are given preferences over urban uses is typical under the older public land laws. Such preferences might well be reexamined in the light of continuing urbanization.

In addition, 43 U.S.C. § 1171 permits the sale of isolated and disconnected tracts, or tracts too mountainous or rough for agricultural use. "Isolated" and "disconnected" refers to lack of other nearby Federal lands and not to lands isolated from habitation or development.88/ Some statutes also permit specialized kinds of urban uses. For example, 43 U.S.C. § 931c authorizes permits, leases, or easements to state and local governmental bodies for the purpose of using land for public buildings or other public works. Under 43 U.S.C. § 971 bath houses, hotels or other improvements for the accommodation of the public can be made available near mineral, medicinal, or other springs located upon public lands.

Rights of way for almost every imaginable urban use can be granted. These rights of way include highways,89/ railroads, (including the right to take natural materials from adjacent lands and to build stations, depots, machine ships and other related railroad buildings), 90/ rights of way for reservoirs, canals, and laterals of canal ditch companies, and irrigation or drainage districts (including the right to take materials from public lanes adjacent to the canal or ditch), 91/ rights of way for ditches, canals, or reservoirs to be used for the purposes of water transportation, domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage, 92/ rights of way used for the purpose of generating, manufacturing, or distributing electric power 93/ rights of way for electrical plants, poles, lines for the generation and distribution of electrical power, and for telephone and telegraph purposes and for canals, ditches, pipes and pipelines, flumes, tunnels, or other water conduits and for water plants, dams, and reservoirs.94/

The above list is not intended to be exhaustive, but illustrative for the wide range of rights of way which may be granted. There is no major urban right of way need that cannot be granted on the public lands. It is also apparent that authorization for various kinds of rights of way could be in one simple statute rather than in several duplicative statutes.

While there are restrictions on the grantee, the Recreation and Public Purposes Act 95/ permits the disposal of public lands for "any public purpose." If the phrase "public purpose" is construed as meaning any purpose for which public lands can be disposed of, then this statute would be authority to make land available for new communities, and the expansion of old communities. If "public purpose" is narrowly construed this statute may not constitute such authority. The regulations do not define "public purpose," but the regulations contain provisions for such uses as advertising "legitimate activities" along highways, ostensibly for the public purpose of informing the traveling public.96/ Such a provision suggests that the term "public purpose" could be broadly interpreted.

The legislative history 97/ contains little information as to the meaning of the phrase "any public purpose", which was added by 1954 legislation 98/. The history only makes it clear that there was a desire to expand the eligible purposes beyond the recreational purposes permitted previously. The history contains a letter indicating that the statute would end the necessity of going to Congress for special laws as was the previous practice when disposing of lands for "public projects." 99/ The phrase "public projects" may have a narrower meaning than "public purposes," though the letter does not indicate such an intent. The letter also indicates, as an example, the need to lease public lands to nonprofit organizations for "camps and for other projects." 100/

Another problem arises concerning whether the Recreation and Public Purposes Act is appropriately applied to only Bureau of Land Management land. Investigation has revealed cases where the application of this act to the forest service would have expedited public use disposals to the benefit of the local and regional public. Further, it may not be possible to use lands under the Recreation and Public Purposes Act unless there is a rather well-formulated planned unit development, as the lands can be disposed of only for an established or definitely proposed project.

Section 10 lands are infrequently disposed of under the Federal Property and Administrative Services Act of 1949. 101/

The Public Land Sale Act of 1964 102/ to provide for disposals for orderly growth and development of a community. This includes disposals for residential, commercial, agricultural, industrial and public uses. This act, however, applies only to Bureau of Land Management. In the case of expanding communities adjacent to forest service lands, such disposals must occur through exchange under authority of the General Exchange Act, the Surplus Property Act of 1944 or the Townsite Act of 1958. The latter two are not generally used. The data presented by the Forest Service related no disposals under these two acts for community expansion over the last ten years. Further, due to the cumbersome procedures associated with the exchange program, it may be appropriate to expand the Public Land Sale Act to the Forest Service.

This review of the statutes makes it abundantly clear that the range of purposes to which public lands can be devoted is broad enough to encompass the occupancy needs for new communities, and the expansion of old communities.

B. Kind of Interest

Disposal of lands for urban purposes is not generally a limitation of other productive uses.

As the previous section points outs, disposal of land for townsite purposes may limit the opportunity to extract minerals from the townsite. In most urban areas, mineral extration is restricted under zoning laws so that the limitations on extractions under the townsite laws may not constitute a more substantial limitation. However, there are numerous and growing instances where mineral extraction, particularly such things as oil and natural gas extraction, are permitted within urban areas. The public land laws probably should allow the local governing body to decide whether mineral extraction is allowed.

Under the Classification and Multiple Use Act of 1964, lands classified generally for disposal for urban purposes, 103/ are available for a broad range of uses; for example, industrial and commercial uses may be made of the lands and perhaps these terms would be broad enough to include mining uses. The fact that the lands are disposed of only after an opportunity is given to the local authority to zone the lands 104/ may well allow the only use restriction imposed on use of land.

C. Class of Land

The class of land generally does not limit its subsequent use for urban purposes.

Disposal or use of land under the laws that are being examined in this section are in general not prevented by limitations on use imposed by the authority under which the land was acquired. The Week's Law is an exception. Lands acquired under that Act must remain national forest lands 105/ except if valuable for agriculture, in which case the lands can be sold as homesteads. 106/

D. Tenure

Tenure limitations may preclude new community development.

Outright disposal generally present no problems of tenure. There are provisions related to tenure such as 43 C. F. R. § 2232. 2-4 under the Recreation and Public Purposes Act, which provide for title reversion if the land is transferred to an ineligible owner or to a different use or is used to discriminate against persons because of race,

creed, color, or national origin. As to leasing, short term leases authorized for leasing of public lands for urban type uses might not be competitive with the leasing of private lands. Some new towns, e.g., Irvine Ranch, California now provide for the leasing rather than the sale of land. There is no statutory limitation on the term of the lease which is permitted under Small Tract Act 43 U.S.C. S 682a but the regulations for these small tracts limit leases to 20 years. 107/ Renewal is possible. 108/ Under 43 U.S.C. S 869-1, leases are limited to 25 years plus renewals of equal terms. Generally, there are no restrictions on the term of leases for rights of way. Leases are limited under other statutes, e.g. leases for public buildings and other public works are limited to 30 years, 109/ and leases for bath houses, hotels, or other improvements near mineral, medicinal, or other springs are limited to 20 years. 110/ It is also possible under the Small Tract Act regulations, 111/ to acquire lands by lease with option to purchase. Such a device would be appropriate to new community development, since it could be devised to permit exercise of the option only if development had taken place according to approved plan.

E. Qualifications of Applicants

Qualifications for applicants are not restrictive.

The Public Land Sale Act of 1964, 112/ defines the qualified governmental agencies and qualified individuals that may acquire lands. The definitions are so broad as to include almost any conceivable state or local agency and any individual except one under 21 who is foreign and does not intend to become a citizen. Certainly, land would be available to any of the new community builders identified by the Advisory Commmission on Intergovernmental Relations (ACIR). 113/ This report identifies the new community builders as (a) the traditional developer-builder, (b) national corporations with cash to invest, (c) a separate corporate group made up of the oil industry, (d) large land owners, and (e) mortgage lenders seeking equity investments.

Perhaps some qualifications should be put on who can acquire land. For example, under the New Communities Act of 1968 bonds issued by a private "new community developer" can be guaranteed only "on the basis of financial, technical and administrative ability which demonstrates his capacity to carry out the proposed project". 114/

Whether a new community could be established under some townsite laws and under current practices for new community development, is somewhat doubtful. While legal title can be acquired for a townsite by an incorporated town or by a judge, 115/ the title is acquired for the benefit of occupants of the land, 116/ for the occupants as to

occupied lots or collectively as to unoccupied lots or for the public or the municipality. 117/ The application of the trustee, occupant plotted townsite laws is most obvious with respect to existing developments where persons are already occupying the land and wish to develop it more formally as a town and secure title. The need for existing population may not be as obvious with respect to forest townsites, but absent existing population it may be difficult for a local government to show a need for a townsite as required by the statute. 118/ Presidential reserved townsites and reclamation townsites are more compatible with the development of new towns on unoccupied lands.

Section 718 of the townsite laws has been subject to considerable litigation, though the litigation does little to clarify whether modern practices for new community development are compatible with the statute. Title cannot be acquired for speculative purposes. 119/ Certainly new community developers are often speculators. However, a new community developer may acquire lands and begin to improve it. He then may qualify as an occupant of the land. The corporate developer could be a settler of the town and a bona fide actual possessor. A municipal corporation may be an occupant; 120/ an occupant need not be a resident of the town; 121/ a person occupying a site for business purposes; 122/ or a company. 123/ Something akin to the typical modern day open space, owned in common may be included within the townsite, for Newhouse v. Simino, 124/ permitted a grant of unoccupied lots for public purposes to all the occupants of the town as aggregation. There is no prohibition against selling land to another occupant. 125/ While some of these cases may suggest that a modern day corporation organized for new community development might qualify as an occupant, there are other cases which make the matter doubtful; for example, Marysville Invest. Co. v. Holle, 126/ indicates that there must be some bona fide individual claims by actual settlers engaged in building a town. An entry solely for the benefit of a corporation cannot be made. The regulations state that prospective town sites cannot be entered. 127/ In addition, if the town is not already incorporated, "the entry must be made...upon petition...signed by such number of actual occupants of lots therein as may be required by the laws of the state...." If this is a reference to state municipal incorporation laws, many states require a minimum number of inhabitants before incorporation is possible. 128/

Since development corporations ordinarily prefer to work with raw land, only the Presidential reservation and reclamation townsite laws would be the most likely authority under which a development corporation would be likely to work. In any event, as the next section on acreage limitations will make clear, the acreage limitations under the townsite laws may well preclude new community development.

Under the Small Tract Act permitting small tracts to be conveyed where the land is chiefly valuable for residence, recreation, or business purposes, 129/ a lease or sale may be made to almost anybody. The only limitations 130/ are similar to those under the Public Land Sale Act of 1964. In short, anyone but a noncitizen who has not declared an intention to be a citizen, or a partnership having such a noncitizen member is qualified to lease or purchase under the Small Tract Act. 131/ However, if the land is classified for community site purposes, it is available only to nonprofit groups and state and local governments. 132/

Applicants under the Recreation and Public Purposes Act 133/ who wish to purchase or lease lands are limited to states, Federal and state instrumentalities, and political subdivisions and nonprofit associations and corporations. 134/ Lands are not available to private individuals or for profit corporations. With these restrictions, it is unlikely that new communities would be built under the provisions of the Recreation and Public Purposes Act. 135/ Public authorities and nonprofit corporations have not recently been involved in any substantial way in the building of new communities.

Municipal corporations cannot acquire land under the Act if not within convenient access to the new municipality and within the same state. Other qualified applicants cannot acquire land outside of their political boundaries or other area of jurisdiction 136/. These restrictions appear appropriate.

There are no limitations as to who may purchase under the Public Sale Act of 1895. 137/ dealing with isolated or disconnected tracts or tracts too mountainous or rough for cultivation. 138/ Similarly, there are no limitations on who may purchase forest townsite lands. 139/

F. Acreage Limitations

Acreage limitations may not be compatible with new community development.

One of the few advantages of using public lands for a new community development is that they may be available in large enough tracts to avoid the problem of land assembly. As the Advisory Commission on Intergovernmental Relations (ACIR) points out, probably the single most difficult problem encountered by a new community development developer is the assembly and development of adequate land at a cost which will average out at a competitive level for various projected purposes and produce enough for total return to provide a reasonable profit. 140/

It is not clear what the minimum acreage requirement is for new communities. The Advisory Commission on Intergovernmental Relations lists 52 new community projects. 141/ On the average they contain 16,000 acres and an average population of 74,000 persons. Some of the new communities are as small as 1,000 acres. The projected population for the new communities is as low as 13,000 people. The ACIR Report, 142/ uses as a criteria, 1 acre for 4 persons as a minimum for a new community. This is 2,560 persons per square mile.

This minimum seems quite generous compared to some existing communities; for example, Santa Monica, California, which is part of the Los Angeles metropolitan area, has over 10,000 people per square mile, and Washington, D.C. had 12,442 persons per square mile in 1960.

It should be noted that new towns, which required a broader range of uses, such as an industrial base, may require more acreage than expanding communities or new communities that do not have a full range of activities. However, such self-sufficient communities as Santa Barbara, California, which is outside the Los Angeles metropolitan area and is generally considered to be a desirable community, had a 1960 population of 58,800 in an area of 17.4 square miles, so it has almost 3,500 people per square mile.

While it is difficult to determine how many persons per acre at a minimum are desirable, something like three or four persons per acre would seem to be a low enough density to satisfy almost anyone's recommendation. At such time as a federal policy on density is established, if ever, higher densities might be appropriate. Since there is presently little consistent federal policy on densities, the densities of 2 or 4 persons per acre as typically utilized by private developers could be a desirable standard.

There is similarly little agreement about how large or small a new community should be in terms of population. A population of 100,000 is often given as a minimum size for maximum efficiency and conventional wisdom often suggests a community of 50,000 persons as affording enough population to provide a full range of cultural experiences without being inefficient.

> (A) town of less than fifteen thousand people lacks many of the facilities of a city, above all, its variety of occupations; while a town above a hundred thousand does not gain enough in variety to compensate for a loss in accessibility and in the vivid sense of a concrete, visible whole, where the activities or urban life come to a focus. 143/

If new towns of about 50,000 persons minimum and about three persons per acre were to be developed, about 17,000 acres per town should be available.

There is no expressed existing policy as to the size of communities which might be promoted in the sale of public lands. No national policy of new community development for the nation's increasing population. No plan or approach to the problem exists. The need for a "national urban land use policy" continues to be expressed. 144/

The acreage of land that may be disposed of for expansion of new communities or new communities is not clear in the Statutes that provide for disposal of such land, in the regulations, or in the administering agency manuals. The Public Land Sale Act of 1964 145/ permits disposal in tracts not exceeding 5,120 acres each. It is not clear if this acreage is an absolute limit or whether one individual or corporation could acquire more than one contiguous tract, or two or more individuals or corporations who are closely associated could acquire contiguous tracts. No acreage limit is stated under the Public Land Sale Act of 1964 where the lands are retained but are used for urban type uses. 146/

Under some townsite laws the amount of acreage depends in part on the number of inhabitants. One hundred to two hundred inhabitants can occupy a maximum area of 320 acres. 147/ No matter the number of inhabitants, Section 720 allows a maximum number of acres which can constitute a townsite. The statute is ambiguous and is construable as allowing a maximum of 2,800 acres. However, in the context of 43 U.S.C. § 725, 2,560 acres is the probable maximum. That statute itself is ambiguous, possibly permitting a town to occupy more than 2,560 acres, but also construable as meaning that preemption or homestead entry can be excluded on lands in excess of 2,560 acres where the townsite actually occupies a larger acreage. Furthermore, Section 725 is difficult to reconcile with 43 U.S.C. § 726 which permits town authorities to state what is the actual site of the town in terms of occupation and improvement and any additional area is eligible for preemption and homestead entry. A final statute on acreage, 43 U.S.C. § 727, indicates that townsites can be expanded as population increases, though it is not clear whether the total area can exceed 2,560 acres.

The regulations interpret those statutes as permitting a 2,580 acre maximum, or more acres if the area is actually settled upon, inhabited, improved, and used for business and municipal purposes. 148/ But as with the statutes, the regulations are inconsistent in that 43 C.F.R. § 2242.3-9 may limit the total area to 2,560 acres. Another possible interpretation is that each additional expansion of an original townsite is limited to 2,560 acres.

At best it is confusing as to what the maximum allowed acreage is; though a presidential reserved townsite is not tied in with size of population. Reclamation townsites are limited to 160 acres unless in the public interest. That may be larger. 149/ Forest townsites are generally limited to 640 acres.

These statutes as a whole tend to reflect an earlier view of urban areas, namely, that there is a sharp distinction between urban areas and rural areas and that only built-up areas are entitled to be within incorporated limits of the city. The more modern view is that urban areas should be surrounded by a hinterland or open space, whether occupied or not. The law today is somewhat exemplified by the Classification and Multiple Use Act, 150/ which allows disposal of lands that are required for the orderly growth and development of a community. This legislative policy is somewhat vague, because the provision for the orderly growth and development of a community may be focused on the expansion of existing communities rather than new communities, and new communities also should have growing room.

While the Small Tract Act 151/ contemplates the sale and lease of public lands for urban type uses, the tracts are limited to a maximum of five acres. The Secretary of the Interior can permit a person or organization to purchase more than one tract, which might authorize him to approve the purchase of contiguous tracts. Normally, however, the Secretary limits the purchase to one tract per purchaser. 152/ Authority of the Secretary to sell sufficiently large number of contiguous tracts to constitute the site of a new community is doubtful.

As explained above, the Recreation and Public Purposes Act, 153/ might be construed as permitting disposal for new community use. However, the acreage is limited to 640 acres. 154/

Under the Public Sale Act of 1895, 155/ an isolated or disconnected tract of the public domain not exceeding 1, 520 acres can be disposed of and tracts that are mountainous or too rough for cultivation can be disposed of, though with a limit of 760 acres.

G. Charges

Pricing policy may preclude new community development.

Generally speaking, public lands available for new community developments are sold to the highest bidder and in any event not less than the appraised fair market value. 156/ The Public Land Sale Act of 1964 is the latest statutory expression in pricing policy, but is not substantially different from that under the townsite law 157/ which permits land sales not less than the appraised "cash" 158/ value

or at the price offered by the highest bidder, whichever is higher. 159/ However, an actual settler can purchase for the minimum price of $10 per lot. 160/ It should be noticed that a "cash" value appraisal is sometimes considered to be different than a "market" value appraisal. Under regulations for the Public Land Sale Act of 1964, fair market value is defined to include dollar value taking into consideration all the terms and conditions of transfer including restrictions. 161/ If the market in which the transaction takes place usually involves financing, as it almost always would in the event of new community development, the market value of the lands may be higher than they would be if a cash sale (i. e. total payment in advance) were required.

Similarly, isolated or disconnected tracts and tracts of the public domain too mountainous or rough for cultivation may be sold only at public auction and at the highest bid price and for not less than the appraised value. 162/ However, most disposals are made at fair market value "taking into consideration the purposes for which the land will be used." This, of course, may be different than fair market value.

The price for acquiring public lands may also be higher than other ownerships because of the requirement that the purchaser compensate the owners of grazing improvements. 163/ Ordinarily when a fee is purchased the market value for the lands is reduced by the presence of improvements that must be removed. The regulations may be requiring market value for lands as if no grazing improvements exist plus payment for grazing improvements, which would make the total outlay larger than for similar lands in private ownership. Improvements are not considered in determining sales prices under the townsite regulations. 164/

Statutory authority for the sale or lease of small tracts under the Small Tract Act 165/ permits the Secretary of the Interior to determine the price. Generally, sales are at appraised fair market value. 166/ He may exercise his discretion to sell for community site purposes at less than fair market value 167/ but not at less than the cost of making a survey necessary to describe the lands sold. 168/ The appraisal for community sites takes into consideration the use to be made of the land. 169/ Except in a few particulars, the various statutes and regulations state the general pricing policy that the Secretary of the Interior has adopted. 170/ His general policy is to dispose to private persons and profit organizations at competitive bid and fair market value, to governments for commercial or industrial use by negotiated sale at fair market value and for public purposes at prices and terms that will encourage accomplishment of the public purpose. If for these lesser prices, the Secretary is assured that the development effort will be bona fide

and substantial. New community and expansion of old community development is not likely to occur on public land unless it is priced as if a public purpose were involved. Without such a write down in land costs, privately owned land may well be used to the extent it is available.

As with sales, there is no writedown of land under permits, leases, or easements. These instruments may be executed "in return for the payment of a price representing the fair market value of such permit, lease, or easement, to be fixed. . . through appraisal. . . ." 171/

The difficulty of carrying the financing for the new community for the extended period of time prior to land sales taking place limits new community development. 172/ To the extent that advance cash payment must be made for public lands and financing is not available, public land will be unattractive as compared to private lands for which financing is available.

Regulations under the townsite laws do permit installment payments, 173/ but under the Recreation and Public Purposes Act, the full purchase price must be paid before a patent will be issued. 174/

Generally, there are no pricing or fee policies to establish rates which would encourage the establishment of new communities or would make land available for the expansion of existing communities where the supply of private land is scarce and resultant land prices are abnormally high. There is an apparent need to recognize scarcity situations and adjust prices to the situation.

The Advisory Commission on Intergovernmental Relations also points out 175/ that "the establishment of large new planned communities with a balanced composition is not economically feasible without significant governmental subsidy." An obvious way of giving subsidies for new community development, and one which was used to stimulate railroad construction, is to sell or lease public lands for less than fair market value. This may be counter to the mainstream of present public land disposal policy and may even by contrary to the policy embodied in urban renewal legislation. Under that legislation, while land may be sold at less than the cost of acquisition, it must nevertheless be sold or leased at its fair value for uses in accordance with the urban renewal plan. 176/

On the other hand, there are numerous Federal programs which provide Federal aid of one kind or the other which could constitute a kind of subsidy to new community development. The two programs most directly appropriate to new community development are the provisions for mortgage insurance for land development in new communities, 177/ and the debt guarantee of New Communities Act of 1968. 178/ In addition, the Advisory Commission, in its report lists additional Federal programs which could be used to provide a kind of subsidy to new community development.

H. Conditions

Conditions imposed on new and expanding community development are minimal.

Under the Public Land Sale Act of 1964, 179/ lands for new communities or the expansion of old communities cannot be disposed of by the Secretary of Interior unless zoning regulations have been enacted by the appropriate local authority "in accordance with local planning and development." Regulations issued under the statute 180/ provide that sales for orderly growth and development will not be made "unless adequate local governmental comprehensive plans have been adopted and adequate zoning regulations are in effect." This regulation perhaps goes beyond the statutes in two respects. First, the regulation suggests that the Secretary of the Interior has some power to determine whether the zoning is adequate. The Secretary, not the local authority undertaking this zoning, apparently determined adequacy. Second, if the regulation requires a master plan. The regulation may be outside the scope of the statute. If on the other hand, the regulation means only to require a comprehensive zoning plan, the regulation would clearly be within the authority of the statute. Apparently, it has not been so interpreted. 181/

As to sales of lands chiefly valuable for residential purposes, etc., zoning is required, plans are not required, but the disposal must be consistent with local government objectives. 182/ Presumably, then, land can be disposed of for new towns without a plan.

In addition, the Secretary has been permitted under the Public Land Sales Act of 1964, 183/ to place reservations and reasonable restrictions as are necessary in the public interest on conveyances. 184/ However, no restriction to insure proper development of the lands after they have passed from Federal ownership can be imposed. 185/ The prohibition against development restrictions was probably imposed on the ground that the restrictions would constitute a cloud on the title. 186/

A cloud on title is not necessarily undesirable. Much urban property use is controlled by private restrictions. Generally, they are not the kind of cloud on title which makes it unmarketable. Restrictions could be imposed to give a longer period of Federal control over the property development. The restrictions imposed by the zoning, on the other hand, could be changed immediately after disposal.

Federal support for and reliance on local zoning and planning has become more pervasive generally in recent years. For example, under the New Communities Act of 1968, 187/ a developer must have a general plan for the physical development of land that conforms to various governmental plans before Federal debt guarantees are available. There are similar requirements under the mortgage

insurance provisions. 188/ Finally, under the Intergovernmental Cooperation Act of 1968, 189/ there is an attempt to coordinate Federal development with state and local plans. Title VIII of the Act. amending 40 U.S.C. § 471 et. seq. by adding the Federal Urban Land-Use Act provides that governmental agencies should to the extent possible not acquire lands or change uses of lands for Federal projects for purposes that are incompatible with local development regulations and should not dispose of federal lands without giving local authorities opportunity to zone and informing prospective buyers as to local zoning requirements. The provisions only apply to urban areas which are defined so that they may not apply to new community development. In addition, the statutes only apply to sales or acquisitions by the General Services Administration.

As with the Public Land Sale Act of 1964, other statutes that permit urban type uses to be made of lands have minimal conditions. The townsite laws 190/ allow the Secretary of Interior to survey the townsite for urban or suburban lots of suitable size, or require occupants to do so. 191/ Survey requirements are typical of an early and not very effective subdivision requirement. However, under 43 U.S.C. § 713, the subdivided lots must conform in size to local ordinances or accepted local standards for subdivision platting, if any, or otherwise to standards prescribed by the Secretary of the Interior. The plat map which is required must also contain a statement of the extent and general character of the improvements, but there is no apparent requirement that any public improvements of any kind be made. Substantively, therefore, the only requirement is that the lands be surveyed to a regulated size and no other regulations or conditions are imposed. While there are no conditions imposed by statute on disposal under the Small Tract Act, 192/ the regulations for the Small Tract Act indicate the Secretary does not favor isolated development which would burden the state or interfere with public purposes. 193/

Under the Recreation and Public Purposes Act, 194/ before land may be disposed of, it must be shown to the satisfaction of the Secretary of Interior that the land is to be used for an established or definitely proposed project. Depending on how rigorous this kind of provision was enforced, it could be an effective control on speculative developments as indicated by 43 C.F.R. § 2232.2-1(b):

> A definitely proposed project (is one)... which has been authorized by competent authority irrespective of whether or not it has been financed and otherwise fully implemented, providing there exists the probability that it will be fully implemented within a reasonable time.

New communities are often merchandized on the basis of promises, though this practice may be curtailed under the Interstate Land Sales Full Disclosure Act. 195/ Perhaps public lands should be disposed of only after some governmental agency has determined that the promises of the developer can feasibly be carried out.

The question remains whether the policy of minimal conditions on the disposal of public lands for new and expanding communities should be continued. The major alternatives are to have no controls, the disposal based on a master plan by a private developer, to rely on state and local controls or to have Federal controls. While such Federal towns as the "green belt" towns in the depression years, which were experimental in nature, 196/ and the Federal towns established for defense purposes, such as Oakridge, Tennessee, and Richland, Washington, were established under Federal controls, this has not been common. Some control can and is achieved by the Federal government by imposition of conditions through Federal programs related to financing. Provisions for land development in new communities, 197/ and the New Communities Act of 1968, 198/ require a plan as a condition to mortgage insurance and debt guarantee. In addition, the FHA has developed standards for planned unit development which must be assured before it will approve mortgage insurance. 199/ In general, however, the regulation of new community development has been left to the states and localities.

In addition to the specific conditions, the Secretary of the Interior has developed a general disposal policy, 200/ which indicates a policy of supporting, encouraging, and cooperating with state and local governments in master planning and zoning and preservation of natural beauty and open space.

I. Criteria for Selection

The criteria for selecting lands which will be disposed of or used for new communities and the expansion of established communities are extensive.

The criteria for the selection of sites for new communities, or the expansion of established communities are not generally contained in the statutes themselves. Under the Public Land Sale Act of 1964 201/ the Secretary of Interior is directed to develop criteria to determine whether lands should be disposed of for the orderly growth and development of a community, or are chiefly valuable for residential, commercial, agricultural, industrial, or public uses for development, or are to be retained for various uses, some of which might be urban type uses.

The criteria for presidential selection under the Townsite Laws, 202/ is that the townsites be on the shore of a harbor, at the junction of rivers, important portages, or any natural or prospective center of population. Reclamation townsites are where "needed....in connection with irrigation projects". 203/ The requirement of the Recreation and Public Purposes Act, 204/ also applicable to the Department of the Interior, that lands be disposed of for a "public purpose" might be a criterion, and a public purpose might include a purpose of urban development. In addition, before land may be disposed of, it must be shown

that there is an "established or definitely proposed project." The statute then reads "land so classified" may not be appropriated under certain circumstances. The quoted language is ambiguous but may be suggesting that land cannot even be classified for public purposes unless there is an established or definitely proposed project. On the other hand, the statute may be saying that it can be classified for a public purpose though it cannot be disposed of until there is an established or definitely proposed project.

Under the Small Tract Act, 205/ land under the Department of Interior cannot be disposed of or leased for urban type uses if the sale or lease of lands would unreasonably interfere with the use of water for grazing purposes or unduly impair the protection of watershed areas. Another criterion is that the land must be in reasonably compact form.

Most of the criteria for classification of lands administered by the Bureau of Land Management for new community or the expansion of established community use are contained in 43 C.F.R. §§ 2410-1 - 2410.1-3, which deal with the criteria for classification.

The general criteria for all land classification are stated in 43 C.F.R. § 2410.1-1. Lands classified for urban use must be physically suitable or adaptable to urban type uses and all present and potential uses and users of the lands are to be taken into consideration. If other considerations are equal the land is to be classified so as to minimize the disturbance of existing users. In addition, all land classifications must be consistent with state and local government programs, plans, zoning and regulations to the extent these state and local matters are not inconsistent with Federal policies and will not lead to inequities among private individuals. Affirmatively, the land classification must be consistent with Federal programs policies. Retention of land for multiple use and management is given equal consideration with disposal and further "the relative scarcity of the values involved and the availability of alternative means and sites for realization of those values will be considered." The meaning of the phrase "the relative scarcity of the values involved" is very vague and is not defined. 206/ Long-term public benefits are to be considered more important than immediate or local benefits and the tract must be classified in a manner which will best promote the public interests.

While 43 C.F.R. § 2410.1-1(b) appears to be neutral with respect to whether retention for multiple use management is to be preferred or not preferred over disposal, the criteria for retention for multiple use management classification 207/ and the additional criteria for disposal classification 208/ attempt to state some preferences, in a rather unclear manner. Under the retention criteria, "lands may be classified for retention under the Classification Multiple Use Act of 1964 if they are not suitable for disposal under the additional disposal classification criteria." However, under the sections for disposal classification criteria, 209/ provides that

> consideration under criteria listed in this part will first be given to whether the lands can be classified for retention.... for disposal, or for both. If.....both the principles of § 2410.1-1(b) will be applied.

The reference is back to the neutral principle on whether retention or the disposal should be given preference.

Since lands might be retained for urban type uses, the criteria under 43 C.F.R. § 2410.1-2 on retention for multiple use management classification criteria is included in this discussion. In order to be classified for retention under the Classification and Multiple Use Act of 1964, the classification must serve one or more of the following purposes. Retention must assist in effective and economical administration of the public lands. It must also further the objectives of Federal natural resource legislation. Much of the legislation specified deals with such things as livestock, hunting and fishing, industrial and mineral development, stabilization of the timber industry and soil conservation, most of which have little to do with urban type uses. However, lands can also be retained in order to realize benefits through occupancy leases or provision of needed recreation, conservation and scenic areas and open space. The latter purposes may well be compatible with urban development. Lands may also be retained to preserve public values that would be lost if lands passed from Federal ownership. The regulations state that public values might be lost and therefore retention is proper if the lands are needed to

> protect or enhance established Federal programs, by such means as provision of buffer zones, control of access, maintenance of water supplies, reduction and prevention of water pollution, exclusion of non-conforming inholdings, maintenance of efficient management areas, provision of research areas, and maintenance of military areas or sites for other government activities.

In addition lands can be retained pending the enactment of Federal legislation which would affect them, pending acquisition by state or local government if they contain scientific, scenic, historic or wilderness values which would be lost if the land were disposed of or if disposal would be inconsistent with national objectives for the preservation of natural beauty of the country and the proper utilization of open space. Lands may be retained if public values may be lost by disposal if

> the lands are best suited for multiple use management and require management for a mixture of uses in order to best benefit the general public and such management could not be achieved if the lands were in private ownership.

This provision should be considered in context with the discussion earlier as to the circumstances under which disposal or retention are preferred. The last quoted provision adds nothing but additional confusion to this matter.

There are special regulations for disposal classification criteria. 210/ The general criteria for disposal classifications includes a determination as to whether the lands are "needed" for urban purposes or whether they are "chiefly valuable" for other purposes. 211/ Note that this regulation presents no clear alternative, for lands could be needed for urban purposes but nevertheless be chiefly valuable for other purposes. The regulation states further that if lands are found to be valuable for public purposes they will be considered chiefly valuable for public purposes except where alternate sites are available to meet the public needs. It is interesting to note that neither the term "public purpose" or "public need" is defined, though the term public value is defined 212/ and certain public values are described. 213/ The Bureau of Land Management has not defined the term public purposes. 214/

Another subsection of the classification criteria for disposal regulations 215/ contains additional criteria for classification of lands valuable for public purposes. Some impression on the meaning of public purposes is discernible from this part of the regulations. To be valuable for public purposes lands must be suitable for noncommercial and nonindustrial state and local governmental programs. Lands can also be conveyed for public or for recreation purposes to nonprofit corporations under the Recreation and Public Purposes Act. 216/

Additional criteria to be met for Bureau of Land Management lands needed for urban or suburban purposes are included in 217/. Under these regulations the community must be formed on the land within 15 years and there must be adequate zoning and local governmental comprehensive plans for expansion of a community. However, if the disposal is under laws other than the Public Land Sale Act of 1964 and if there are no comprehensive plans the disposal need only be consistent with the views of local governmental authorities. Zoning with respect to the disposal under the laws for urban or suburban purposes is not specifically required. 218/

This regulation contains additional criteria for classification of lands valuable for residential, commercial, and agricultural, or industrial purposes. 219/ Lands which have value for such purposes as residential, commercial or industrial purposes are to be considered valuable for that purpose which represents the highest and best use of the lands, that is, their most profitable legal use in private ownership. However, adequate zoning regulations and local governmental comprehensive plans must be in effect, unless there are no plans, in which case disposal can be under some act other than the Public Land Sale Act if the disposal is consistent with the view of local governmental authorities.

In addition to the criteria for classification, contained in 43 C.F.R. Section 2410 et. seq., limited additional criteria for selection sometimes appear in those parts of the regulations which implement the statutory provisions being considered in this discussion. 220/

For example, townsite entries are not permitted over lands covered by patented mineral claims and the continued use and occupation within a townsite of a duly located mill-site claim defeats the rights of the claimant under the townsite laws. 221/

Under regulations for the Recreation and Public Purposes Act, 222/ the lands are not available unless the land is classified as suitable for the purpose sought, is not needed for any other public purpose and is not more valuable and suited for some other use, such as the development of power. Regulations under the Small Tract Act 223/ indicate that applications for small tract sites will be considered in connection with policies of conservation of natural resources and in connection with the effect the development would have on the communities or area involved as to the availability of schools, utilities and other facilities. Land is not to be disposed or leased if it could lead to private ownership or control of scenic attractions or water resources, nor are isolated or scattered settlement to be permitted which would impose heavy burdens upon state and local government.

It would be hard to defend the proposition that the conditions for disposal on use and occupancy of Section 10 lands should be different than disposal or use and occupancy of surplus federal lands for new and expanding communities. The latest policy statement on the latter matter is contained in Development Standards for Surplus Land for Community Development Program (SLCD), U.S. Dep't. Housing and Urban Development (March 1969). That document implements the policy of making surplus federal lands available for urban development, particularly lands within metropolitan areas. These federal lands are made available only under a host of conditions designed to promote the quality of life in urban areas. For example, housing should be mixed as to type, form of ownership; occupants should be of mixed economic, social and racial backgrounds; superior employment opportunities and schools should be provided; facilities to inculcate a sense of community must be present; restrictive state and local business to technological innovation should be overcome. Additional conditions are contained in the document. Enough has been stated to suggest that present conditions imposed for disposing and retaining Section 10 lands for new and expanding community development are far less rigorous and national federal urban development policy oriented than they might be.

VIII. RESERVOIR FLOWAGE AREAS

There appear to be no major problems with regard to disposal or retention of public lands for reservoir flowage areas.

Footnotes

1. 43 U.S.C. § 956.
2. 10 U.S.C. § 2668.
3. 43 U.S.C. § 958.
4. 16 U.S.C. § 525.
5. 43 U.S.C. § 533.
6. Federal Aid Highway Act, 23 U.S.C. § 13.
7. 23 U.S.C. § 138 and 49 U.S.C.A.S. 1653 (f).
8. 23 U.S.C. § 320.
9. 23 U.S.C. § 112, 201-214, and 308.
10. 23 C.F.R. § 15; Bureau of Land Management Instructional Memos No. 64-486, December 18, 1964, No. 65-20, January 15, 1965 and No. 65-146, March 18, 1965.
11. 40 U.S.C. § 345(b).
12. 43 C.F.R. § 2234.1-2.
13. Opinion of the Attorney General, February 1, 1962.
14. 43 U.S.C. § 956.
15. 43 C.F.R. 2234.2-5(b)(2).
16. 43 C.F.R. §§ 2234.1-1 through 1-6.
17. 43 C.F.R. 2234.1-1 to 1-6.
18. 16 U.S.C. § 533.
19. 17 Stat. 91.
20. This is particularly a problem on national forest lands. Case Study No. 1 in Appendix E discusses this problem in detail and therefore need not be elaborated upon here.
21. 49 U.S.C. §§ 1101, 1102, 1108, and 1115.
22. 50 U.S.C. 1622 as carried through in the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 473.

23. Ch. 728, 45 Stat. 728 as amended by Act of August 16, 1941, Ch. 354, 55 Stat. 621, 49 U.S.C. §§ 211-214.

24. 43 U.S.C. § 959 and 43 U.S.C. § 961.

25. 43 U.S.C. § 959.

26. 16 U.S.C. § 791a-793, 795-816, 820-825.

27. 43 U.S.C. § 961.

28. Forest Service Manual, Sec. 2728.

29. 43 U.S.C. § 959.

30. 43 U.S.C. § 682(a).

31. 43 C.F.R. 2233.5(b).

32. 43 C.F.R. 2334.4.

33. 36 C.F.R. 251.52.

34. 43 U.S.C. § 959.

35. 43 U.S.C. § 961.

36. This has been expressed by many private utility companies in numerous hearings before the Public Land Law Review Commission.

37. 15 U.S.C. § 831.

38. 15 U.S.C. § 832.

39. 15 U.S.C. § 833.

40. 15 U.S.C. § 825s.

41. Letter of 11 March 1963 from Federal Power Commission to Secretary Udall.

42. 15 U.S.C. § 825s.

43. The following bills were introduced: H. R. 10838, 84th Congress, 2nd Sess., (1956); H. F. 3947, 85th Congress, 1st Sess., (1957); H. R. 6926, H. R. 7678, S. B. 1883, 86th Congress, 1st Sess., (1959); H. R. 3323, 87th Congress, 1st Sess., (1961).

44. 43 U.S.C. § 1411(a).

45. 43 U.S.C. 946.

46. 43 U.S.C. § 951.

47. See discussion of the Federal Power Act of 1920 in Part 2, supra.

48. 43 U.S.C. § 946.

49. 353 U.S. 112(1957).

50. 43 U.S.C. § 956.

51. 43 C.F.R. 2234-1-1(b)(9), 2234.1-3(a)(1).

52. 43 U.S.C. 417 or 945.

53. 43 U.S.C. 946, 948.

54. 43 U.S.C. 664, 951, and the Act of 1901, 43 U.S.C. 959, 16 U.S.C. 79, 522.

55. 43 C.F.R. 2234.1-6(c).

56. 43 U.S.C. §§ 946, 948.

57. 43 U.S.C. §§ 664, 950, and § 951.

58. 43 U.S.C. § 952.

59. 43 C.F.R. 2234.1-6(a).

60. Forest Service Handbook, 2755.84, Articles 11 and 12.

61. 43 U.S.C. § 1411(a).

62. 43 U.S.C. § 959 (1964); 16 U.S.C. § 79 (1964).

63. 43 U.S.C. § 961 (1964).

64. 66 Stat. 95 (May 27, 1952).

65. 31 Stat. 790 (February 15, 1901); 16 U.S.C. §§ 79, 522 (1964); 43 U.S.C. § 959 (1964).

66. Telecommunications Industry's Position Statement on Public Land Use For Consideration By Public Land Law Review Commission, submitted by the United States Independent Telephone Association and the American Telephone and Telegraph Company, September 29, 1969.

67. Id.

68. 62 Stat. 17 (February 5, 1948); 25 U.S.C. § 323.

69. 40 U.S.C. § 310, et. seq., (October 23, 1962); 76 Stat. 1129 permits granting of permanent easements over real property of the United States which is not part of the "public lands."

70. 36 Stat. 1253 (March 4, 1911), amended (May 27, 1952); 66 Stat. 95.

71. See Chapter VII pp. 75-86 for detailed explanation of charges imposed.

72. F.S. Manual § 2728.22 (1); the regulations also point in this direction, 36 C.F.R. § 251.3 (1969).

73. Memorandum to Stephen H. Hart, Colorado Representative PLLRC, from Elmer W. Coyer, Representative for Bell System Telephone Companies, October 3, 1969, p. 5.

74. 43 U.S.C. § 1411 (a).

75. See e.g., Cobb, Latest Federal Efforts to Oust Utilities from Highways, ABA Publi. Util. Law Sec., 1969 Ann. Rep., pp. 25-35.

76. General Exchange Act, Act of 20 March 1922; 12 U.S.C. 485, 486; 5 U.S.C. 511.

77. 43 U.S.C. § 1411(a).

78. 43 U.S.C. § 1411(b).

79. 43 U.S.C. § 1411(b).

80. See Reps, The Future of American Planning: Requiem or Recascence? Land-Use Controls 1, Vol. 1, No. 2(1967) and Reps bibliographic note, Id. at 11.

81. 43 U.S.C. §§ 711-31.

82. 43 U.S.C. § 561.

83. 7 U.S.C. § 1012a; 16 U.S.C. § 478 (a).

84. 43 U.S.C. §§ 717, 722, and 728.

85. 43 C.F.R. §§ 2242.2-7(b), 2242.7-1(a).

86. See e.g., Bonner v. Miekle, 82 F. 697 (C.C. Nev. 1897).

87. 43 U.S.C. § 682(a).

88. 43 C.F.R. § 2443.0-7(d).

89. 43 U.S.C. § 932.

90. 43 U.S.C. § 934.

91. 43 U.S.C. § 946.

92. 43 U.S.C. § 951.

93. 43 U.S.C. § 957.

94. 43 U.S.C. § 959.

95. 43 U.S.C. § 869(a).

96. 43 C.F.R. § 2232.2-1(g)

97. 2 U.S. Code Congressional and Administrative News 2316-22 (1954).

98. 68 Stat. 173.

99. Letter from Orme Lewis, Ass't Sec. Interior to Hon. Hugh Butler, Chairman of the Committee on Interior and Insular Affairs, U.S. Senate, Mar. 5, 1954, 2 U.S. Code Congressional and Administrative News 2319 (1954).

100. Id.

101. 40 U.S.C. § 471 et seq. See discussion I-22 et seq. See also the discussion of surplus land for Community Development Program at the end of this Chapter.

102. 43 U.S.C. §§ 1421, 1424, and 1425.

103. 43 U.S.C. § 1411.

104. 43 U.S.C. § 1422.

105. 16 U.S.C. § 521.

106. 16 U.S.C. § 519.

107. 43 C.F.R. § 2233, 3-1(a).

108. 43 C.F.R. § 2233.3-4.

109. 43 U.S.C. § 931c.

110. 43 U.S.C. § 971.

111. 43 C.F.R. § 2233.3-3.

112. 43 U.S.C. § 1425.

113. ACIR, Urban and Rural America: Policies for Future Growth, Report A-32, p. 79 (April 1968).

114. 42. U.S.C. § 3904(a)(1) (Supp. IV, 1969)).

115. 43 C.F.R. § 2242.3-2.

116. 43 U.S.C. § 718.

117. 43 C.F.R. § 2242.3-2.

Footnotes

118. 7 U.S.C. § 1012a, 16 U.S.C. § 478(a).

119. Hodges v. Lemp, 24 Idaho 399, 135 P. 250 (1913).

120. Blue Earth County v. St. Paul, 28 Minn. 503, 11 N.W. 73 (1881).

121. Downman v. Saunders, 3 Okl. 227, 41 P. 104 (1895).

122. Hagar v. Wikoff, 2 Okla. 580, 39 P. 281 (1895).

123. Winfield Town Co. v. Maris, 11 Kan. 128 (1873).

124. 3 Wash. St. 648, 29 P. 263 (1892).

125. Cain's Heirs v. Young, 1 Utah 61 (1876).

126. 58 Kan. 773, 51 P. 281 (1897).

127. 43 C.F.R. § 2242.3-3.

128. E.G., 500 inhabitants. Cal. Gov't C. Section 34302. See Hagman, Standards for Incorporation and Municipal Boundary Change Recommendations Bases on a Study of Statutory and Case Law in the United States (1968), HUD Contract, Project No. Minn. PD-1.

129. 43 U.S.C. § 682a.

130. 43 U.S.C. § 682c.

131. 43 U.S.C. § 682a.

132. 43 C.F.R. § 2233.0-2(b).

133. 43 U.S.C. § 869 and § 869-1.

134. 43 C.F.R. § 2232.0-1.

135. 43 U.S.C. § 869.

136. 43 C.F.R. § 2232.2-1(f).

137. 43 U.S.C. § 1171.

138. 43 C.F.R. § 2243.0-7(g).

139. 7 U.S.C. § 1012a, 16 U.S.C. § 478a.

140. ACIR, Urban and Rural America: Policies for Future Growth, Report A-32, at 104 (April 1968).

141. ACIR, Urban and Rural America: Policies for Future Growth, Report A-32, Table 41 (April 1968).

142. Id. at 77.

143. Foley, Book Review, 31 J.A.I.P. 73 (1965).

144. Address by Samuel C. Jackson, Assistant Secretary for Metropolitan Development, at Annual Convention of the National Association of Real Estate Brokers, Aug. 21, 1969 in HUD News, HUD-No. 69-0705, Aug. 21, 1969.

145. U.S.C. § 1421.

146. 43 C.F.R. § 2410.1-4.

147. 43 U.S.C. § 720.

148. 43 C.F.R. § 2242.3-4(b).

149. 43 U.S.C. § 561.

150. 43 U.S.C. § 1411(a).

151. 43 U.S.C. § 682a.

152. 43 C.F.R. § 2233.0-6(a)(3); Bureau of Land Management Information Bulletin No. 4 (1967).

153. 43 U.S.C. § 869.

154. 43 U.S.C. § 869(b)(ii).

155. 43 U.S.C. § 1171.

156. 43 U.S.C. § 1421, 43 C.F.R. § 2243.2-5(e).

157. 43 U.S.C. § 712.

158. 43 C.F.R. § 2242.1-1(a).

159. 43 C.F.R. § 2242.1-2(e)(1).

160. 43 U.S.C. § 713, 43 C.F.R. § 2242.2-6(a).

161. 43 C.F.R. § 2243.2-1(c)(2).

162. 43 U.S.C. § 1171.

163. 43 C.F.R. § 4125.1-4(a)(8).

164. 43 C.F.R. § 2242.1-1(a).

165. 43 U.S.C. § 682a.

166. 43 C.F.R. § 2233.0-2(b).

167. 43 C.F.R. § 2233.7.

168. 43 U.S.C. § 682b.

169. 43 C.F.R. § 2233.7(a).

170. 43 C.F.R. § 1725.2-1.

171. 43 U.S.C. § 931c.

172. Advisory Commission on Intergovernmental Relations, Urban and Rural America: Policies for Future Growth, Rpt. A-32 of 104 (Apr. 1968).

173. 43 C.F.R. § 2242.4-3.

174. 43 C.F.R. § 2232.2-3(e).

175. Supra, noted at 172.

176. 42 U.S.C. § 1460(c)(4).

177. 12 U.S.C. §§ 1749aa - 1749aaa (Supp. IV, 1969).

178. 42 U.S.C. §§ 3901 - 3914 (Supp. IV, 1969).

179. 43 U.S.C. § 1422.

180. 43 C.F.R. § 2243.2-1(b)(2).

181. Telephone conversation with Mr. Collins, Bureau of Land Management, Riverside, California, Sept. 8, 1969.

182. 43 C.F.R. § 2243.2-1(b)(2).

183. 43 U.S.C. § 1424.

184. See also 43 C.F.R. § 2243.2-7.

185. 43 C.F.R. § 2243.2-1(b)(4).

186. See Congressional Record, 21 August 1964, Senate Report 1471.

187. 42 U.S.C. § 3903, (Supp. IV, 1969).

188. 12 U.S.C. § 1749cc (Supp. IV, 1969).

189. Pub. Law 90-577; 82 Stat. 1098.

190. 43 U.S.C. § 712.

191. 43 C.F.R. § 2242.2-2(a)(1).

192. 43 U.S.C. § 682a.

193. 43 C.F.R. § 2233.0-2.

194. 43 U.S.C. § 869(a).

195. 15 U.S.C. § 1701-1720 (Supp. IV, 1969).

196. See A. Mayer, Greenbelt Towns Revisited (Oct. 1968).

197. 12 U.S.C. § 1749cc (Supp. IV, 1969).

198. 42 U.S.C. § 3903, (Supp. IV, 1969).

199. See e.g., FHA, Land-Use Intensity Land Planning Bulletin No. 7 (1966).

200. 43 C.F.R. § 1725.2.

201. 43 U.S.C. § 1411(a).

Footnotes

202. 43 U.S.C. § 711.

203. 43 U.S.C. § 561.

204. 43 U.S.C. § 869(a).

205. 43 U.S.C. § 682a.

206. Telephone conversation with Mr. Collins, Bureau of Land Management, Riverside, California, Sept. 8, 1969.

207. C.F.R. § 2410.1-2.

208. 43 C.F.R. § 2410.1-3.

209. 43 C.F.R. § 2410.1-3(a)(1).

210. 43 C.F.R. § 2410.1-3.

211. 43 C.F.R. § 2410.1-3(a)(2).

212. 43 C.F.R. § 2410.0-5(n).

213. 43 C.F.R. § 2410.1-3(c).

214. Telephone conversation with Mr. Collins, Bureau of Land Management, Riverside, California, Sept. 8, 1969.

215. 43 C.F.R. § 2410.1-3(c).

216. 43 C.F.R. § 2232.0-1.

217. 43 C.F.R. § 2410.1-3(b).

218. Telephone conversation with Mr. Collins, Bureau of Land Management, Riverside, California, Sept. 8, 1969.

219. 43 C.F.R. § 2410.1-3(d).

220. For the Public Land Sale Act these regulations begin at 43 C.F.R. § 243.2; as to townsites see 43 C.F.R. § 2242; as to isolated and mountainous tracts, see 43 C.F.R. § 2243.0-3; as to recreation and public purposes see 43 C.F.R. § 2232; as to small tracts see C.F.R. § 2233.

221. 43 C.F.R. § 2242.3-7(a)(2) and (b).

222. 43 C.F.R. § 2232.2-1.

223. 43 C.F.R. § 2233.0-2(a).

CHAPTER XVI

SPECIAL PROBLEM AREAS

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I. RAILROAD PROPERTY USES

At the outset, it is necessary to be aware of the magnitude of problems that exist with regard to railroad grants, both of land in place and rights-of-way.

A. Problems of Conveyance of Railroad Property Interests

One problem area concerns in place grants to the railroads under the special land grants. Some of the land available to the railroads under this plan was never applied for by the railroad and therefore never listed as vested in the railroad in the United States records. Nevertheless, railroad companies have conveyed this land away and present occupiers are without clear title to the land. In other cases the railroads conveyed in place land including the right-of-way traversing it, again resulting in present occupiers not possessing clear title to the land. The current solution to the problem involves the innocent purchaser seeking relief from Congress through private bills to validate the railroad's conveyance. The present flood of bills of this nature points up need for general legislation in this area.

B. Problems of Forfeiture of Railroad Right-of-Way

Another problem is revealed by limited surveys of rights-of-way where it has been discovered, in California particularly, that the rights-of-way were being extensively occupied and used for non-railroad purposes. By terms of the original right-of-way grants, railroads possessed an occupancy interest in right-of-way so long as they continued to use it for railroad purposes. If the railroad purpose ceased, however, the railroad company no longer possessed an interest in the land. In such cases, the means whereby rights-of-way would be declared forfeited by the railroad company are very vague. The 1875 and prior Special grant Acts provided that the rights-of-way would be cancelled by the United States if they were no longer used for railroad purposes, however, they failed to indicate what procedures were necessary in order to terminate the railroad's right-of-way. The Acts did not state whether forfeiture would be accomplished by legislative, executive or judicial act. The first legislative attempt to solve this problem was the Forfeiture Act

of September 29, 1890. 1/ This act was designed to recover fee lands from specific grants in situations where the railroads failed to construct the railroad lines.

In 1909 Congress passed 43 U.S.C. § 940 a legislative enactment declaring forfeiture of unbuilt railroad sections under the 1875 Act. In 1912, in the Taggart v. Great Northern Ry. Co., 2/ a Federal district court declared that only the United States government can declare a forfeiture. In 1922, Congress passed 43 U.S.C. § 1912 providing that declaration of abandonment could be made by Congress or by the courts. In a Bureau of Land Management Instruction Memo No. 64-520, dated June 30, 1965, the Acting Assistant Solicitor for lands advised that the right-of-way could be cancelled by contest proceedings. The railroad companies themselves have always been able to voluntarily relinquish their rights-of-way provided public convenience and necessity did not require continued rail service. 3/ There is still no clearly stated legislation which indicates who may declare forfeiture of railroad right-of-way, under what circumstances this may be accomplished, and whether the entire right-of-way is forfeit, or just that portion being occupied for non-railroad purposes.

C. Problems of Interests in Railroad Rights-of-Way

Even if forfeiture of railroad rights-of-way were clarified there would still exist the problem of who would then receive clear title to the land. Rights-of-way under the special grants were in the nature of a fee determinable, meaning that the United States retained a reverter interest and on forfeiture would regain clear title to the right-of-way. Under the 1875 Act, however, there has been much confusion as to the interests possessed by the railroad companies, the Government and underlying patentees. In 1915, The Supreme Court decided in the Stringham Case that the 1875 right-of-way was a fee simple determinable, not an easement, so that the land would go to the Government upon forfeiture, not to the underlying patentee. However, in 1922, Congress altered this decision by passing 43 U.S.C. § 912 which provides that abandonment of a right-of-way may be declared by Congress or the courts and upon such declaration the fee interest vests in the underlying patentee or their successor except that the United States retains its interest in the minerals. Again in 1942, the Supreme Court ruled that the nature of the interest granted to railroads under the 1875 Act conveyed an easement.

D. Effect of Current Railroad Policy on Occupancy Use of Rights-of-Way

Chapter XIV of this report reviewed current use made of railroad right-of-way. It would appear that their policy encourages any and all occupancy use of the right-of-way.

The railroads do not have an interest to convey in right-of-way for development for non-railroad use. The only cases where they may do so are in conveyances for public highways. The fact remains that the railroad companies have leased or otherwise permitted use and collected money for use made of right-of-way for non-railroad purposes. In rural and agricultural areas leases of right-of-way for crops are made for token fees received by railroads. There is in fact little demand for occupancy use of right-of-way in rural areas. In and around urban developments, however, the situation is somewhat different. Railroads have benefited from considerable income derived from industrial and commercial leases of right-of-way. Although the lessees benefit by occupancy, it is not financially feasible for them to make major improvements because they are on short-term leases. In addition, many municipalities would like to benefit by occupancy of right-of-way for civic expansion or recreational areas and are unable to do so because the railroads cannot and/or will not convey land within the right-of-way. The railroads justify occupancy use of right-of-way in several ways. By equating railroad benefit with railroad purposes, they claim they are not violating the terms of the original grants. Secondly, by issuing short-term leases they state that occupancy is temporary pending future development of right-of-way strictly for the railroad. In this way, they feel they can not be accused of abandoning the right-of-way. If the railroads did not have the policy of granting any and all occupancy uses on right-of-way, the present controversy of property interests would never have arisen.

E. Effect of Current Laws and Policies on Railroad Conveyance of Interest in Right-of-Way

The current policy of the United States appears to be one of trying to maintain the status quo on the railroad right-of-way issue. By not enforcing the conditions of the original grants through adequate field work and land status surveys, the Government cannot determine where railroad companies have allowed or solicited occupancy use for non-railroad purposes. Thus property interests are handled on a case by case basis with relief being given by Act of Congress.

Present legislation fails to provide a clear definition of railroad occupancy interests. Additionally, the Department of Interior has not enforced the rights of the United States and subsequent patentees because it does not have statutory authority to do so.

F. Proposed Solutions to Railroad Property Problems

Much legislation has been presented in Congress in an effort to clear up railroad grant problems. The first proposed solution was H.R. 6630 and identical H.R. 6945 introduced in the 87th Congress in 1961. These bills would amend the Act of May 25, 1920 relating to conveyances of certain parts of rights-of-way by railroad companies. The Johnson Bill of H.R. 6630 amended through suggestions of the Bureau of Land Management provided that by Congressional Act conveyances by railroads of rights-of-way or station areas to abutting patentees or municipalities would be validated. The Secretary of the Interior would concur in the conveyance and the Government would reserve mineral rights. The Secretary of the Interior would not concur if compensation received by the railroads was in excess of administrative costs and expenses. Two major criticisms of this bill were that the United States would not receive any compensation for its interests in the land, and secondly, that the abutting patentee was at the mercy of the railroad company in obtaining such a conveyance.

A second bill H.R. 3229 tackled the problem in a different but more encompassing manner. This bill proposed that any conveyance by a railroad, not limited to railroad purposes, would result in abandonment of the grant to the United States. Within specified time limits, the grantee could apply to the Government for title or lease. This bill provided for the United States to recover from railroad companies one-half of the compensation received for leases or conveyance. There was sharp criticism of this section of the bill in view of the fact that underlying patentees had originally purchased the land from the Government by paying for the entire section regardless of the right-of-way traversing it.

The third solution was proposed by the Department of the Interior. Its purpose was to afford the Secretary the authority to diminish the railroad rights-of-way to the width actually being used or planned to be used for railroad purposes. The objection here was by the railroad companies who feel that Congress does not have a right to take away what was granted to them.

Whatever solution is eventually proposed and passed by Congress, it is clear that with increasing values of land and population pressures for their occupancy and use, general legislation is desperately needed to correct the problems presently experienced in the realm of railroad rights-of-way. Until this occurs, railroad companies will continue to encourage use of right-of-way through leases or simply by allowing trespass of the right-of-way. In addition, the present authority of the Bureau of Land Management to police occupancy use of railroad rights-of-way is not very clear so that they cannot enforce any standards. As a consequence, present policy appears to allow if not encourage continued independent granting of use of the right-of-way by the railroad companies only increasing the magnitude of the existing title and use problems.

II. MILITARY AND OTHER FEDERAL GOVERNMENT USES

The distribution of Section 10 lands throughout the Nation is such that in many areas two or more agencies control intermingled lands. This necessitates cooperative management policies between these agencies for the mutual use of the land and protection of the natural resources. Two major systems effect such use. The withdrawal system involves transferring control of the land from one agency to another, whereas alternatives such as permits, licenses, memoranda of understanding, etc., do not.

Use of the withdrawal system can provide potential hazzard for the natural resources because of differences in primary functions of the various Federal agencies. For example, in the Pacific Northwest, the Bonneville Power Administration has the primary function of developing the power resource by providing for power transmission, often across Forest lands. In contrast, the Forest Service has primary functions of protecting watershed, timber and scenic resources. Use of the withdrawal system in such a case would involve transferring Forest lands to an agency not set up to deal with them or protect Forest resources. In the case study on utility use cited in Chapter XIV, an alternative to withdrawal, namely a Memorandum of Understanding, was utilized. By effecting this alternative to withdrawal the Forest Service was able to retain control over Forest lands and provide the management policies which allowed transmission of the power resource over Forest lands without unduly damaging Forest resources.

In another case study on water transmission use also cited, the Atomic Energy Commission initially requested withdrawal of land for water transmission purposes. The Bureau of Land Management investigated the case and determined that with approval from the Federal agencies controlling the Section 10 land in question, it was not necessary to withdraw the land, rather the water pipeline could be protected by recording it under the principles of 44LD513. Several other case studies presented in Chapter XIV point out the effectiveness of the present system in utilizing alternatives to withdrawal to provide for occupancy use of Section 10 lands by Federal agencies while at the same time protecting the natural resources by retaining control of the land within each agency best suited to manage it.

III. NATURAL AREAS

A. Present Agency Policies for the Establishment of Natural Areas

1. Bureau of Sport Fisheries and Wildlife

The Bureau of Sport Fisheries and Wildlife refers to the three objectives of natural areas set forth in the Directory of Federal Research Natural Areas for their statement of policy. This referral by itself, with no definition or program of implementation, nor special adaptation to particular agency policies is evidence of a true lack of policy as regards natural areas. The recent appointment of a biologist as director of natural areas does, however, show the Bureau of Sport Fisheries and Wildlife is aware of the lack of policy which has heretofore characterized this agency's natural area efforts.

Although the Bureau of Sport Fisheries and Wildlife does not have the expressed statutory authority to establish natural areas on the public lands, enabling legislation has been interpreted to allow the formation of classified areas within ranges and refuges. The recommendation to create natural areas originates with the field agent managing the particular refuge or range. The designation of particular areas by the field agent is then evaluated by the district office and sent to the Director of the Bureau of Sport Fisheries and Wildlife in Washington, D.C., for final approval. Criteria to be used for the designation of natural areas are those contained in the Directory of Federal Research Natural Areas.

This directory, however, does not contain criteria for the selection of sites, rather it points out the goals of the natural area system in terms of possible functions.

With regard to the policies of the Bureau of Sport Fisheries and Wildlife which might affect the decision to create, or not to create, a natural area there seems to be one policy which could inhibit the preservation of natural areas. Since the bureau's prime responsibility is to preserve the wilelife in the refuge or range, in the case of a natural threat to a particular species, there might be a tendency to manipulate the environment to save the wildlife to the detrement of other wildlife. In cases where the threat was natural, this manipulation would result in the disruption of the natural processes upsetting the true nature of the area. This, of course, would be incompatible with proper management of natural areas.

There is no established criteria for management of these areas and no qualifications as to their availability to researchers and educators. The present procedure is a letter sent to the local office requesting permission to enter a natural area.

2. United States Forest Service

The policies of the Forest Service as expressed in the Forest Service Manual make only brief reference to natural areas. 4/ There is a policy of protection of all areas under Forest Service control which could, if applied, arbitrarily be inconsistent with either the creation or management of natural areas. This policy allows control of natural threats even where the community is adapted to these threats, as in the case of fire adapted chapparal.

The Forest Service Manual has no natural area classification listed. The closest category of lands which are natural areas as defined above are the Scientific Research Area. Some of the requirements for a Scientific Research Area are similar to those previously expressed for natural areas but there is no uniformity between the two classification systems.

Selection of sites for consideration as Scientific Research Areas is done by the research arm of the Forest Service. The selection of sites by this group could result in a research oriented system of natural area sites. The system of Scientific Research Areas was perpetuated on the basis of need for areas for selected research. This is one of the objectives of a natural area. Final approval of

these areas is made by the Regional Forester. A copy of the recommendation is sent to the Director, Division of Recreation and Land Uses, and while the Forest Service Manual implies the Director has the final say, the communication seems to function only as information as to the proceedings which have already taken place.

There are no provisions for use of Scientific Research Areas in terms of the qualification of persons who should be allowed to carry on research in these areas, nor is there any indication of what type of activity would be permitted.

3. National Park Service

The National Park Service policies allow for the management of natural areas. The only conflict between the allowance of destructive natural processes and manipulation of the environment comes when physical structures are involved. Policies regarding who may conduct research, and under what conditions are clearly set out in the National Park Service Manual.

The manual does not specifically set policies for natural areas as such, rather it treats the part of a park not specifically set aside for recreation purposes as a natural area. These we defined as research stations. As regards natural threats, fire is allowed to run its course after burning can be contained within predetermined fire management units and when such burning will contribute to the accomplishment of approved vegetation and/or wildlife management objectives. If fire is a threat to physical facilities or cultural resources, however, it is curbed. Similar provisions are made for agriculture. Landscaping is allowed only if consistent with and not materially disruptive of the maintenance of natural ecological associations. As regards wildlife management, control is through predation if possible. Where intensity of recreation use threatens park values limitation on size of parties and frequency of trips to specific locations may be imposed. Since the management policies of the National Park Service are such as to allow the natural processes to predominate, the policies of the National Park Service more closely approximate a natural area policy than any other Federal agency. However, natural areas as such are not specifically established according to a uniform policy consistent with other agencies.

There is a thorough discussion of research station policy in the National Park Service Manual. A research station is set up by the service after application is received and approved by the National Park Superintendent. Criteria are set out for the determination of what groups should be allowed to conduct research. Contracts are entered into with researchers to assure payment of damages in the case of destruction of some part of the environment through research.

4. Bureau of Land Management

The Bureau of Land Management follows the objectives for natural areas as set out by the Federal Committee on Research Natural Areas and the definition of natural areas as set out by the same committee. The Bureau of Land Management has considered these as sufficient to guide field agents in their selection of potential natural area sites. There seems no stated policy regarding the management of natural areas other than the general statements in the directory as to prohibitions of grazing, timber cutting. These are insufficient guidelines and evidence lack of clearly defined policy. The ability of field workers to recognize those sites which are sufficient in terms of size, condition, etc., to be considered as possible natural areas is also in question.

The procedures for classification of natural areas is keyed to securing the views of the public as to the value of proposed natural areas before permission for filing a protective withdrawal application is sought. Upon the identification of a natural area (this identification occurring in normal field work) the State Director of the Bureau of Land Management contacts agencies and organizations interested in such areas for their view and asks the office of the Director of Bureau of Land Management for permission to institute multiple-use classification proceedings. When he receives permission he publishes notice of the proposal and holds a public hearing in accord with 43 C.F.R. § 2411. Upon completion of the proceeding the State Director decides whether to continue with the classification, request permission to file a protective withdrawal application, or to terminate all proceedings. No criteria are given for choice among these three possibilities. The office of the Director of the Bureau of Land Management must finally approve the protective withdrawal application.

B. Opportunity Cost

As noted previously in Volume II, Part 4, Chapter XIV, there are no recognized criteria as to the amount of acreage required for a minimum, medium or maximum natural area system. Consequently,

the opportunity costs of placing a particular amount of Section 10 lands into use for a natural area system as opposed to some other use cannot be determined. These costs cannot even be assessed from the standpoint of public policy as there are no uniform objectives set forth for a natural area system.

It is reasonable to assume, however, that lands suitable for natural area sites are also likely to be suitable for a number of resource and occupancy uses. For example, sites appropriate for forest types may also be suitable for commercial timber activities. Similarly, potential grassland sites are likely suitable for agricultural or grazing purposes. Opportunity costs, then, might be viewed in terms of the interference caused by the potential functions and uses of each level of natural area system with the other functions and uses that could be made of the land.

1. Minimum System

The opportunity cost in a minimum system is likely to be the lowest of the three systems. Individual sites would probably be relatively small, reducing the chance of interference with other uses. Consequently minimum system site locations are likely to cause less interference with commercial resource activities. Acquisition costs of additional lands to make up a minimum system, should also be at a minimum. Further, there are more likely to be representative sites already under control of private agencies. These sites might be absorbed into a minimum system by entering into arrangements with private groups. However, as there is little potential for research in a minimum system, it will probably not be able to offset the costs of additional site acquisition by the benefits that might accrue from other resource activities. Since the system will protect samples of species which might otherwise become extinct, it may function as a supplier in the case of an emergency, but this is a fairly tenuous benefit. Thus, while it seems clear that the minimum system will result in less interference with commercial activities, and that cost of additional lands will be low, it also will most likely result in less benefit.

2. The Medium System

A medium system would appear to have the second lowest opportunity cost. Its research potential is substantially increased over that of the minimum system. While the benefits to be derived from research activities are difficult to assess, they are likely of considerable

economic value. The increased acreage of individual sites, however, will mean that sizeable areas of valuable resource land will be withheld from exploitation. The size of medium system sites may be such as to interfere with the incidental activities of exploitation (i.e., transportation, construction of facilities) as well as reduce the amount of land available for exploitation. Further, the greater number of individual owners involved increases the likelihood of higher acquisition cost. In addition, as private conservation groups have not concentrated on obtaining samples of ecosystems (on which the system is based), fewer sites will be in control of those sympathetic to the objectives of natural areas.

3. The Maximum System

The maximum system will most likely result in the highest opportunity cost. Research benefits could counteract much of the high cost of land near educational institutions and the larger amounts of land required to be withheld from commercialization or other use. On the other hand, the necessity of having different samples of the same ecosystem may require that many samples be taken from the same area. This could result in prohibitive costs for commercial ventures in such areas.

IV. RESOURCE USE RELATIONSHIPS

The mere presence of an occupancy use on public land, either in conjunction or competition with other resource uses and activities, creates potential problems in land management. These problems of "multiple use," either potential or existing, must be considered in evaluating public land policies and practices affecting occupancy uses, particularly when the pressures for occupancy uses competes with the original, intended use of the land. It is an existing or potential problem on all Federal lands as there is virtually no land with only a single use; all land upon which rain or snow falls is watershed, all land except the most extreme desert has some wildlife, nearly all land has some forage or tree growth that can be harvested. Even if the latter uses are excluded, as from most national parks, watershed and wildlife values remain along with recreational values.

This problem of competition among uses has been recognized in public land management for many years. Early in the 1870's, Carl Schurz,

then Secretary of the Interior, spoke of the optimum use for the greatest public benefit. Gifford Pinchot, one of the early conservationists, espoused a philosophy of public land management when he said:

> When the use of all the natural resources for the general good is seen to be a common policy with a common purpose, the chance for the wise use of each of them becomes infinitely greater than it had ever before. 5/

From this early acknowledgement of the need to provide for our present land use requirements, without exhausting the supply, 6/ came today's concept of "multiple use" management. It is impossible to speak of the conflicts and the effects of various occupancy uses on other resources and activities without relating the discussion to the "multiple use" concept.

A. Agency Policies

Before an examination can be made of the relationship between multiple use and the conflicts which appear between occupancy uses covered in this study and the other resources, it is important to examine agency policies with regard to multiple use management concept. This is done through a review of the criteria which must be followed in implementing a management policy.

1. Bureau of Land Management

The Bureau of Land Management policy for classifying land is given in the following criteria as expressed in 43 C.F.R. § 2410.1-1.

All classifications under these regulations give consideration to ecology, priorities of use, and the relative values of the various resources in particular areas. They must be consistent with all the following criteria:

(1) The lands must be physically suitable or adaptable to the uses or purposes for which they are classified. In addition, they must have such physical and other characteristics as the law may require them to have to qualify for a particular classification.

(2) All present and potential uses and users of the lands will be taken into consideration. All other things being equal, land classifications will attempt to achieve maximum future uses and minimum disturbance to or dislocation of existing users.

(3) All land classifications must be consistent with State and local government programs, plans, zoning, and regulations applicable to the area in which the lands to be classified are located, to the extent such State and local programs, plans, zoning, and regulations are not inconsistent with Federal programs, policies, and uses, and will not lead to inequities among private individuals.

(4) All land classifications must be consistent with Federal programs and policies, to the extent that those programs and policies affect the use or disposal of the public lands.

When, under these criteria, a tract of land has potential for either retention for multiple use management or for some form of disposal, or for more than one form of disposal, the relative scarcity of the values involved and the availability of alternative means and sites for realization of those values are to be considered. Further, long-term public benefits are to be weighed against more immediate or local benefits. Only then is a tract classified in a manner which will best promote the public interests.

2. Forest Service

The Forest Service believes that in establishing detailed long-range objectives and in providing day-to-day administrative decision, the overall objective is to provide the highest possible benefit. This can be accomplished by following these criteria: 7/

(1) Is the orderly development of all the resources and uses being provided for?

(2) Is each resource or use to be managed for a sustained yield or multiple-use basis that will assure effective coordination of all uses?

(3) Will the objectives, goals, and policy criteria being set up provide for maintaining the land in a continually productive condition, that is, productive of all resources and uses as contrasted to a single resource or use?

(4) Are there adequate safeguards of all elements of the public interest in all of the resources, the uses of which are vital to economic and social progress and to community and national stability and well being?

(5) Is there provision for adequate investments in the future through development programs and the foregoing of maximum and immediate capital returns to the Government in order that sound and productive long-term use may be assured, even though some of the uses may result in relatively little or no capital returns?

(6) Is there adequate provision for participation in the development and support of local communities through a share of national forest receipts?

B. Occupancy Use Conflicts

The problem of competing uses becomes difficult to resolve when the uses are of a more permanent nature occupying single parcels of land as is the case for a number of the occupancy uses discussed in this study. Numerous examples of such conflicts can be cited; powerlines across National Forest have removed valuable timber resources; vacation home sites have precluded public recreational use of forest land; mining roads across national forests have caused problems in watershed protection and erosion control; and major highway construction has damaged scenic values and fish and wildlife habitats.

On all public lands, for any type of occupancy use covered in this study, there are regulations of one type or another that permit control of the effects of the occupancy use on other resources and activities. For example, the Forest Service and Bureau of Land Management have standard provisions in their permits or lease for occupancy uses for watershed protection, erosion control, etc.

Conflicts of primary importance, however, still remain. The Forest Service presently has little control over some types of mining roads across National Forest lands. The general mining laws provide no authority for either the control of mining operations or the restoration or treatment of land surfaces disturbed by prospecting or mining. Although conditions governing fire protection can be enforced by the Forest Service, there is question as to whether regulations can be enforced to control mining access roads. The only recourse the Forest Service has under the existing laws is to endeavor to obtain signed agreements from mine operators to minimize surface disturbances and use appropriate techniques for protection of slopes and construction of access roads. The users, however, do not have any obligation to enter into these agreements, nor do they have any responsibility to principles of conservation of resources except those self-imposed.

Another major conflict occurs on Forest Lands crossed by powerline rights-of-way. The increasing demand for power has necessitated an increase in powerline rights-of-way through National Forests resulting in reduced timber production and defacement of scenic areas. While the Forest Service can require certain protective measures be taken during construction of the transmission line, there is no general authority or policy whereby they can regulate the quantity and location of these powerline rights-of-way across the National Forests. One proposed solution which all agencies favor is common corridors, for several different types of utilities to use jointly. However, at present this is not technically feasible. In one instance where a powerline utilized the same right-of-way area as a gas pipeline, there is electric induction of current into the gas pipeline facilities with the result that it is a potential hazard both in terms of forest fires and human safety. The use of direct current in electrical transmission may help solve this problem.

A conflict of a slightly different nature occurs when vacation home use of Forest lands precludes development of public recreation areas. Here the resource being developed is the same, namely recreation use, however, a greater public, for example, could enjoy a camp ground facility than the select population presently occupying vacation home sites.

Efforts have been taken to minimize the effect of highways on wildlife and fish habitats. There is presently a provision in the federal highway code 8/ directing the Secretary of Transportation to consult and cooperate with the Secretaries of Interior, HUD, and Agriculture, and the states to develop transportation plans and programs. In addition this code forbids the Secretary of Transportation to approve any project which requires use of public land in any public park, recreation area, or wildlife or waterfowl refuge of national, state or local significance unless: 1) there is no feasible and prudent alternative to using such land, and 2) the program includes "all possible planning to minimize harm" to such area from that use. Since this provision only took effect in 1968 it is difficult to assess the effect that it has had to date. It is a very general provision and to be able to evaluate it one would have to know how it is translated into administrative practice. Policies of the Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife, and provisions in the Field Manual of the Branch of Wildlife Refuges, § 3453c, require the maintenance of at least a 300 foot natural buffer strip at points where refuge timberlands are contiguous with Federal or State highways and along primary roads within the refuge boundary. In Montana any state agency about to disturb a stream bed is required by the State to submit plans 60 days in advance to the State Department of Fish and Game for review and recommendations designed to mitigate damage and increase benefits to fishery production.

C. Policy Implementation

Demands on public lands for all occupancy uses are going to increase as population continues to expand. Demands will be placed on lands administered by all Federal agencies. Residential, commercial, and industrial needs for Forest Service land as well as numerous occupancy use demands for Bureau of Land Management land will likely become greater as our population approaches the 326,000,000 projected for the year 2000. If these needs are to be satisfied and the natural resources protected, the somewhat different "multiple use" management policies of the Forest Service and the Bureau of Land Management will of necessity need to merge in order to minimize occupancy use conflicts. The Forest Service criteria of multiple use management directed to large areas will need to take on the character of the Bureau of Land Management criteria for choosing among competing uses:

> "Long-term public benefits will be weighed against more immediate or local benefits. The tract will then be classified in a manner which will best promote the public interest."

In addition to adhering to "multiple use" management policies, the conflicts cited will have to be alleviated through appropriate modifications to the existing system.

The development and implementation of a definite policy of vacation home site recovery, for example, as expressed in Chapter XIII of this study, would provide for present needs while insuring future use for the maximum public benefit. Both the multiple use policies of the Forest Service and Bureau of Land Management must, however, be vigorously implemented in the future if the impact of occupancy uses on other resources is to be minimized.

Footnotes

1. 43 U.S.C. §§ 904-907.

2. 208 F. 455 (1912).

3. 49 U.S.C. § 1.

4. Forest Service Manual 2725.4.

5. Pinchot, Gifford, "Breaking New Ground," Harcourt, Brace & Co., New York, 1947.

6. Teal, V. N., First National Conservation Congress, Seattle, Washington, August 26-28, 1909.

7. "The National Forest System and Outdoor Recreation" prepared for the Outdoor Recreation Resources Review Commission July 1960 by the U.S. Forest Service.

8. 23 U.S.C. 138.

PART 6

ALTERNATIVES TO EXISTING SYSTEM

Part 6 presents possible modifications or alternatives to the existing system. Chapter XVII summarizes the overall statutory problems resulting from the existing system for use and occupancy of public lands. The focus of this chapter is on the major legal problems and alternatives with respect to the statutory scheme for disposal and use and occupancy of Section 10 lands. That is, the law should be clear, concise and consistent if Section 10 lands are to be disposed of and used and occupied in an efficient and just manner. Chapter XVIII summarizes problems, by use, and presents alternatives to the existing system of laws, regulations, and policies.

It is expressly noted that some of the "problems" which the alternatives are designed to eliminate or ameliorate have been identified by parties directly interested in a particular point of view with respect to the use and occupancy study. Many of these have been expressed in numerous Public Land Law Review Commission hearings. This is also true of the advantages and disadvantages that have been advanced with respect to some of the alternatives, which may have varying degrees of validity and may be counterbalanced by competing considerations. The alternatives discussed here are, however, those which appear to have the greatest relevance and for which possible advantages and disadvantages can be stated with some logic.

CHAPTER XVII

STATUTORY ALTERNATIVES

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STATUTORY ALTERNATIVES

I. ALTERNATIVE 1 – Comprehensive Statutes for All Agencies for Disposal and Use and Occupancy

A. Summary

Under this alternative a comprehensive statute authorizing use and occupancy and disposal of Section 10 lands would be provided and superseded laws would be repealed.

B. Issues

S. Bill 1599, 1600 and 1601 were introduced in the 88th Congress. Bills 1599 and 1601 were comprehensive statutes designed to permit use and occupancy or disposal, whereas 1600 was limited to sales. Bills 1599 and 1601 contained a list of statutes whose repeal would be effectuated by adoption of the new laws. For laws of applicability only to certain states or territories or for certain purposes not covered in this study, see the bill.

Laws to be repealed of more fundamental concern to this study included the following under S. 1601, § 11:

43 U.S.C. §§ 671-700 sale and disposal of public lands.

43 U.S.C. §§ 711-731 reservation and sale of townsites on public lands.

43 U.S.C. §§ 1071-1080 abandoned military reservations.

43 U.S.C. §§ 1171-1177 sale of isolated tracts.

and the following statutes under S. 1599, § 14:

43 U.S.C. §§ 711-715, 717-724, 725-727, 728 townsites.

43 U.S.C. §§ 682a-682e sale or lease of small tracts.

43 U.S.C. §§ 1171, 1171a, 1171b, 1175, 1176, 1177 sale of isolated tracts.

In addition, in 1961 Department of the Interior proposed legislation would repeal authority to dispose of mountainous lands and lands too rough for cultivation (43 U.S.C. § 1171).

C. Key Feature

Enactment of comprehensive legislation and repeal of outmoded laws.

D. Probable Advantages

In general, a comprehensive statute would reflect the modern views of Congress as represented in the Public Land Sale Act of 1964 and expand that concept to all agencies and to use and occupancy.

Subcommittee on Public Lands for the Sen. Comm. on Interior and Insular Affairs, 88th Cong., 1st Sess., The Public Lands 26-27 (Comm. Print 1963) lists the advantages of repealing the townsite laws, the Small Tract Act and the Isolated and Rough or Mountainous Tract laws.

1. Repeal of Townsite Laws

Townsite laws are a hogepodge. The various procedures for townsites are partially interdependent partially alternative and partially unrelated. They are obsolete due to new development methods for townsites. In addition, limitations on size sometimes impede normal community growth.

Some of the townsite laws provide for public sale followed by private sale which has not uncommonly resulted in dispositions at inordinantly low prices. Further, some of the townsite laws do not make adequate provisions for preference rights.

2. Repeal of Small Tract Act

Development of small tracts has been retarded by the possibility that surface values may be entirely destroyed by activities under the U.S. mining laws.

3. Repeal of Isolated and Rough or Mountainous Tracts Laws

The fact that tracts are isolated, rough or mountainous does not necessarily mean that the lands are appropriate either for retention or for disposal. The criteria in the law are therefore obsolete.

The purpose of the proviso for rough or mountainous lands has largely been accomplished. Letter from George W. Abbott, Sec. Int. to Speaker, House of Rep. Jan. 12, 1961 suggesting amendments to 43 U.S.C. § 1171. The problem had been that there were many unused and inaccessible corners of lands largely running up from valley lands that might be valuable to the owners of the valley land, but were of no appreciable value to anyone else. If they could be attached to the land of adjoining landowners they might be valuable to him, worth ditching and roading, and would become part of the local tax base. Most land covered by the proviso has now been acquired.

E. Disadvantages

None apparent.

II. ALTERNATIVE 2 — Disposal - Surplus Property to State and Local Governments

A. Summary

Under this alternative, the laws providing for disposal of surplus government property to state and local government bodies should be amended to make the law clearer and more consistent, to provide more uniform price reductions and reductions based on the degree of public benefits and comprehensive planning involved.

B. Issues

In 1962 the President and the General Services Administration proposed an amendment to laws disposing of surplus real property to State and local governments for various public purposes. The proposed bill did not basically alter the surplus property disposal program but provided common standards, terms and conditions, provided for negotiated sale at 75 percent of fair market value and unified administrative responsibilities of various agencies.

The purpose of the bill was to make federal statutes enacted in different times and under varying circumstances more consistent and to provide a common policy.

C. Key Features

Some of the key features were as follows:

The bill did not expand the laws which provide for disposal at substantially less than fair market value.

The bill did cover disposals for airports, health, education, park, recreation, historic monuments and wildlife conservation uses and certain other uses handled by negotiated sales.

The bill would establish a sliding scale for non-negotiated sale type uses so that the price would be discounted in proportion to the public benefit and the comprehensive planning related to the disposal.

Negotiated sales for such uses as municipal buildings, municipal parking lots, storage and maintenance areas, and commercial and industrial areas would be made at 75 percent of fair market value.

With such small discounts of 25 percent, restrictions on use would not be imposed so that the federal government would be relieved of administering the restrictions.

By paying the higher of 75 percent of fair market value of the lands at the time of acquisition or at the time restrictions limiting property to public uses was removed, the property could be acquired in fee.

Unless the fee was acquired, use restrictions would ordinarily exist in perpetuity. However, when in the public interest, a term could be placed on the restriction. In no case could the term be less than 20 years and this basic minimum could be lengthened by the president.

Governmental bodies could shift from one public use to another, so long as ordinary restrictions applicable to the changed public use were met.

D. Probable Advantages

In addition to providing a clearer and uniform program for handling disposal of surplus real property, the various features of the bill would: 1) respond to the desire of state and local governments to stimulate commercial and industrial development; 2) relieve administrative burdens of policing many restrictions; 3) dispose of surplus property more quickly, thus reducing burdens of protection and maintenance; 4) eliminate the cost of advertising and offering properties for sale; 5) make changing of use easier as circumstances change.

E. Probable Disadvantages

None apparent.

III. ALTERNATIVE 3 – Coordination Among Federal Agencies - Control of Bureau of Public Roads

A. Summary

Under this alternative, the Bureau of Public Roads would become the agency responsible for coordinating planning and construction of highways on the federal-aid systems and for approving designs and standards for all highways financed by federal funds.

B. Issues

In 1961 the Bureau of Public Roads proposed that it be made the agency primarily responsible for coordinating the planning and construction of federal-aid highways and approving designs and standards for all highways financed by federal funds. This power presently exists in more than one department.

C. Key Features

See summary, above.

D. Probable Advantages

Responsibilities of the Bureau of Public Roads would be clarified. Only one federal agency rather than many would deal with the States for construction of roads, thus affording continuous and consistent contact with the states so as to better obtain their cooperation.

If design standards are approved by one agency, standards can be more uniform.

E. Probable Disadvantages

The Bureau of Public Road typically deals with the needs of motorists for high speed long distance transportation, in such areas as National Parks roads are not designed for that purpose and the Bureau of Public Roads has no special competency to deal with roads on the Park lands. The Bureau of Public Roads already has developed good cooperative and consultative relationships with other federal agencies and more formal control in the Bureau is not needed.

IV. ALTERNATIVE 4 — Granting Authority - Uniform Policy As To What Federal Department Is Granting Agency

A. Summary

Under this alternative, a uniform federal policy would be enacted as to what federal department is responsible for permitting use or making disposals of Section 10 lands.

B. Issues

Uses of Section 10 lands can be divided for purpose of the discussion of this problem into two basic groups — block users of lands, e.g. commercial, residential, recreational space users; and linear users, e.g. highways, utility lines, pipelines, irrigation ditches, etc. Ordinarily, block users of lands will be using lands subject to the administrative or other control of only one federal agency. That is, permission to use the land can be obtained from one person within one agency. Frequently linear land users may have need to secure interests in different kinds of Section 10 lands that are administered by more than one agency. Various kinds of patterns exist for handling the problem, as follows:

1) The agency controlling the land grants interests and no other agency is concerned.

2) A different agency than the holding agency grants interests in land, with or without the joint consent or affirmative act of the holding agency.

3) A different agency than the land holding agency grants interests in land but the landholding agency can require stipulations or make comments but cannot absolutely bar the grant.

C. Key Feature

As to block users of land, no viable alternative appears other than to suggest that the agency holding or administering the land should make the disposal or permit use. Differences may exist as to rules of different agencies, but there are some general differences anyway in terms of the kinds of conditions and interest that should be imposed as to different kinds of lands. For example, it may still at least be the theoretical policy that public lands are to be disposed of and national forest retained. If there are truly no differences in policy as to similar kinds

of uses on different kinds of Section 10 lands, terms and conditions should be consistent among the land holding agencies.

As to linear users of land, it is far less clear that each land holding or land administering agency should make its own grants. It may be that any linear users of land, particularly where the linear use covers lands held or administered by different agencies, that one agency should make all the grants. Since as to some lands and as to some linear uses the Department of the Interior has already been given power to make grants to linear users, all power to make such grants might be reposed with the Department of the Interior. Alternatively, since the large land holding agencies, Agriculture and Interior can both claim the right to be the logical agency to make grants for all linear uses, the power might be divided so that Agriculture makes grants as to lands it holds or administers; Interior as to land it holds or administers. Lands held or controlled by other agencies could be assigned either to Agriculture or Interior or assigned in some logical way to one or the other agencies. Logical ways might include assignment to that agency which has otherwise granted the majority of the site for the linear use previously, land in certain states could be assigned to the agency having the most lands in that state, or the lands held or controlled by other agencies could be divided up in some arbitrary way. Joint regulations might be required.

If one agency is given the sole authority to grant, this does not mean that the holding agency whose lands a e crossed by the linear use should have no say. The holding agency may be impowered to impose stipulations or conditions, request the imposition of stipulations or conditions, or make comments. The series of alternatives last described are all dependent on a policy choice of how much control other than absolute veto should be given the land holding or controlling agency.

D. Probable Advantages

As to block uses of land. So long as there are a variety of federal land holding agencies, and it is unlikely that any of them would willingly give up their rights to control use and occupancy and disposal, block uses of land should be administered by the land holding agency having the land sought by the applicant.

By making terms and conditions consistent among the federal land holding agencies where the nature of the lands should not dictate a difference in terms and conditions of use, potential users could deal

with a more consistent and simplified body of law not fettered by parochial and ideological differences among the federal land holding agencies that are not based on overall national policies.

As to linear uses of land. As to many linear uses of lands, other federal and state regulatory bodies already have something to say about the use. When the linear user also has to deal with several land holding agencies, the complexities increase.

So long as the specialized views of the various land holding agencies affected must be sought by the federal agency permitting the linear use or making a grant for such a use, there is merit in having one or a few federal agencies that can become specialized in dealing with the problems of linear uses of lands.

E. Probable Disadvantages

As to block users of land. None, so long as policies among the agencies are consistent and vary only because of overall national policies with respect to certain kinds of land.

As to linear users of land. If the land holding agency holds substantial amounts of land, it can develop its own special capability to deal with linear uses.

If the land holding agencies each deal themselves with block uses of land, they should perhaps also each deal themselves with linear uses of lands.

V. ALTERNATIVE 5 — Remedy Inconsistencies in Statutory Patterns

A. Summary

This alternative would require the amendment of statutes so as to provide a statutory scheme for disposal and use and occupancy of Section 10 lands that would be consistent and coherent with differences based only on policy choices.

B. Issues

So long as there are many statutes of a specialized nature dealing with limited aspects of disposal or use and occupancy of Section 10 lands that have been enacted from time to time, there is a great likelihood that these statutes will reflect no consistent or coherent policy. The

problem can be cured by having comprehensive, omnibus statutes, which is recommended in other alternatives in this study. In the absence of a comprehensive statute, the individual statutes should be examined to see whether they are consistent on policy grounds or should be changed to reflect new attitudes.

Examples of some of the inconsistencies and ambiguities having no basis in policy can be given. For example, persons qualified to obtain Section 10 lands might be described in a statute or the statute might not state any qualification at all. In some statutes it is citizens, associations or corporations who are eligible. Does it add anything when another statute indicates that citizens, associations, partnerships and corporations are eligible? What is the difference, if any, if the term, persons, firms or corporations is used in the statute. Governmental bodies eligible are variously described as nonprofit groups.

Similarly, lease terms are inconsistent. Under various statutes they are unlimited and indefinite, have a fixed term, have fixed terms of few or many years, are or are not stated to be renewable.

Some of these differences might reflect a current, consistent policy but many of them are historical accidents. That is, if the statutes were being enacted today and the matter was being rethought, many changes would be made.

Similarly, maximum acreages vary from statute to statute. Some maximums are fixed, others totally discretionary, some maximums are very small, others very large, some give an amount but allow for discretion to grant overages, rights of way widths vary under different statutes providing for the same kind of use. Not all of these differences can be rationalized today.

Similarly, pricing policy does not appear to be consistent throughout the statutes. Pricing ranges all the way from free to the higher of fair market value and the competitively bid price. Phraseology used to express essentially the same pricing policy is different. An unclear and inconsistent pricing policy leads to great pressure to utilize statutes not designed for a particular purpose to be so used even though another statute more clearly covers the matter, merely to obtain the favorable price.

Similarly, the phraseology of granting interests is inconsistent. Terms such as the following appear in various statutes: disposal, sale, transfer, lease, easement, right of way, permit, license, contract, memorandum of understanding, notation, etc.

Similar kinds of inconsistencies in policy and ambiguity and lack of uniformity could be repeated for every sub category of this study when more than one or a few statutes both touch on the same sub category under investigation. For example, sale could be consistently used to mean transfer of fee interests in land. Lease could consistently be used to describe less than fee interests in land. The term permit could be used in those cases where a personal right rather than an interest in land is created. It may be appropriate to create two other categories. For example, the term "lease" could be used to describe those less than fee interests in lands which do not involve linear use of land. The term "easements" or the term "rights of way" could be used to describe those linear uses of lands such as highways, railroads, oil and gas pipelines, electric lines, aqueducts, irrigation ditches and the like. Easements or rights of way could be of two varieties, namely in fee and less than fee. The term "memorandum of understanding" or some other term different than those previously stated could be used to cover those situations in which one federal agency temporarily occupies lands held by another federal agency.

Purposes and uses permitted on lands are variously described, often without indication of clear policy grounds; preference rights vary with no distinguishable basis in policy; conditions imposed differ in situations where one would expect them to be the same.

C. Key Feature

If no comprehensive, omnibus statute is enacted, at minimum the existing statutes should be amended to remove some of the more glaring inconsistencies. The goal is to create sensible classifications.

For example, there are four or perhaps five basic groups of qualified applicants for lands. They are 1) anyone, 2) citizens or those intending to become citizens, 3) state governments and their subdivisions and 5) perhaps, regulated industries. If these become the four or five (perhaps there are more) basic divisions of qualified applicants on which other policy choices are made, such as pricing policy, acreage limitations, etc., the categories ought to be clarified and uniform language to describe the category be used throughout.

For example, lease terms could all be handled the same. It is probably difficult to justify a statutory scheme where a fixed term is specified for some leases and other statutes allow unlimited discretion. If renewals are or are not to be allowed, that should be stated, or if not stated at all, and left to inference, left to inference in all cases.

This is not to say that all leases for all purposes to all applicants would be the same but to suggest that differences should be justified on policy grounds rather than because of inadvertence.

The existence of the several pricing policies can sometimes be explained on the basis of how much of a subsidy the federal government wishes to give so that land will be used for a particular purpose or by a particular entity. Where the statute clearly expresses a pricing policy, the different policies are not objectionable. However, sensible classes of purposes and of eligible applicants for the various price preferences should be maintained throughout the statutory scheme. For example, three and certainly not more than five terms could be used to replace the potpourri of terms used in granting interests or personal rights to use land.

D. Probable Advantages

An unclear, inconsistent and redundant statutory scheme is always a waste of resources. More persons must be hired to administer the statutes, litigation is often necessary to resolve ambiguity, statutes that are too ambiguous are not used at all, statutes designed for another purpose are bent to use for a questionable purpose, the public must hire skilled technicians to deal with the law and be fully apprised of alternatives. The proposed alternative would change all this.

E. Probable Disadvantages

Examples of inconsistencies, ambiguities and redundancies are easier given than eliminated. While it would be possible to amend each of the existing statutes being keenly aware to create only those differences dictated by policy, it would be easier to draft omnibus comprehensive statutes and repeal statutes of limited coverage.

VI. ALTERNATIVE 6 — Applicants and Preferences - Preferences to Adjoining Land Owners - Isolated and Disconnected Tracts

A. Summary

Under this alternative, preferences to adjoining land owners for isolated and disconnected tracts would be given only to bona fide owners as defined in the alternative.

B. Issues

In 1961 the Department of the Interior drafted proposed revisions to the law authorizing the sale of isolated and disconnected tracts. This came from a letter from George W. K. Abbott, Secretary of the Interior to Speaker, House of Representatives, Jan. 12, 1961, suggesting amendments to 43 U.S.C. § 1171. One suggested revision attempted to make it more difficult for speculators to become adjoining owners for the sole purpose of obtaining the preference.

C. Key Feature

The key features of the proposed revision included the following: to be entitled to the preference of being permitted to match the highest bid or pay three times the appraised price of the land, whichever is higher, the owner of adjoining land would:

1) have to own at least a legal subdivision i.e., a quarter-quarter section or a designated log,

2) have to show that he, or that he and the person from whom he acquired land by descent or devise, had owned the land for at least one year prior to the sale at public auction,

3) require the preference holder to bid at time of sale rather than give him 30 days after sale to decide whether or not to exercise his preference.

D. Probable Advantages

The letter cited above indicated that owners of small parcels adjoining isolated and disconnected tracts and those who had purchased solely to take advantage of the preferences afforded by contiguity would not be able to put themselves in the same position as a long-term adjoining owner who had a legitimate entitlement to the preference.

Speculators would not be able to take advantage of the three times appraised value price when that was lower than the bid price.

The advantage of requiring the adjoining landowner to bid at time of sale was, according to the letter, to encourage bidding, since all bidders present would have knowledge of their actual opportunity to purchase.

E. Possible Disadvantages

Under the existing law, when two or more landowners who are contiguous to the land to be sold seek the preference, the Secretary of the Interior is authorized to make an equitable division of land between them. This authority might justify a regulation or practice of denying speculative buyers preferences on the ground that equity would dictate they take none of the land becoming available. The existing authority would also avoid the arbitrariness of the proposal where there were bona fide owners of less than a legal subdivision who could well be entitled to part of the lands made available.

The rationale for eliminating the 30 days to exercise the preference is not clear. Having the preference holder present may actually discourage other bidders or might lead to collusion between potential bidders and preference holders. A better reason for eliminating the 30 day period is stated by the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, The Public Lands, 88th Cong., 1st Sess., 30 (Comm. Print 1963). The reason is that it is under existing legislation to purchase adjoining land during the 30 day period and then become preferred.

The alternative of which this is a variation would permit more flexibility and equity in preferences because a precise standard is not used.

VII. ALTERNATIVE 7 — Applications and Preferences - Discretionary Authority on Preferences for Isolated and Disconnected Tracts

A. Summary

Under this proposal, the Department of the Interior would have general statutory guidelines and discretionary authority concerning the granting of preferences for isolated and disconnected tracts.

B. Issues

The Department of the Interior proposed legislation in 1963 which would allow the Secretary considerable discretion in developing rules for preferences (S. 1600, 88th Cong., 1st Sess.).

Preference rights have been stated in the Isolated and Disconnected Tracts Law, 43 U.S.C. § 1171, which requires the Secretary to grant the preference though the preference holder was not a bona fide landowner to whom the legislation intended a preference. The proposal would change this.

C. Key Feature

The legislation provided as follows:

The Secretary may provide by regulation, under such terms as he deems appropriate, that owners of land contiguous to the land offered for public auction under this section and authorized users of such offered land may have a preference right to buy the offered land at the highest bid price, considering such factors as extent of contiguity of the offered and privately owned land, duration of ownership of the privately owned land, legitimate historical use and topography of the offered land, and desirable land pattern and use.

D. Probable Advantages

Preferences presently existing under the law have sometimes led to results not in keeping with good land tenure and use. The proposal would change this.

While the preference was presumably designed to protect activities on adjoining privately owned lands, adjoining land in very small quantities had been purchased by some persons merely to secure the preference rights. The proposal would change this.

The present law of preferences sometimes results in necessary administration of the laws to the economic damage of those who had considerable contiguous acreage that could be well integrated with the adjoining land.

Under existing law a preference could be obtained by becoming an adjoining owner during a 30 day period after bids of non-adjoining owners were obtained.

Since the purchase could be at three times appraised value to preference holders, which price was sometimes lower than bid price, lands were sometimes sold at less than what the government could otherwise obtain. These advantages are stated in Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, The Public Lands, 88th Cong., 1st Sess. 29-30 (comm. Print 1963).

See the alternative entitled Applicants and Preferences - Preference to Adjoining Land Owners - Isolated and Disconnected Tracts.

E. Probable Disadvantages

None apparent

VIII. ALTERNATIVE 8 — Charges — Isolated and Disconnected Tracts

A. Summary

This alternative would amend the isolated and disconnected tract legislation to clarify the price charged for lands.

B. Issues

In 1961 the Department of the Interior proposed legislation to amend the law on isolated and disconnected tracts. The law provided for disposal at not less than the appraised value. This was thought to be ambiguous.

C. Key Feature

The law read that sale could be at "not less than the appraised value." Interior suggested that the phrase be changed to "not less than its appraised fair market value."

D. Probable Advantages

Clarify doubts as to meaning of these laws and make the statement of price more consistent with other recent legislation.

E. Probable Disadvantages

It is probable that appraised value means appraised fair market value in any event.

IX. ALTERNATIVE 9 — Charges — Pricing Policy to State and Local Governments

A. Summary

Under this alternative charges for land conveyed to state and local governments for public purposes would be at below fair market value; at or below fair market value when for resale.

B. Issues

Several proposals have been made in recent years to offer Section 10 type lands to states and localities at below fair market value when used for public purposes and to make lands available to states and

localities for resale for private development at prices at or below fair market value.

Where property is made available for public purposes at below fair market value state and local governments are subsidized in acquiring needed land and the use of land for public purposes of various kinds is stimulated.

The purpose of making property available at fair market value or lower where a resale is contemplated is to make lands available to states and localities so that they can become merchandizers of land without substantial financial risk.

C. Key Features

Some of the recent legislative proposals to offer lands for public purposes at below fair market value are as follows:

S. 1601 88th Cong., 1st Sess. provided that sales or leases may be made for public purposes to states and localities at a nominal sum not less than the cost of survey, examination and processing provided the lands were used for nonprofit purposes.

H. R. 206 (Id.) provided for conveyance without consideration for use as a park, public ground, school, or public building site, or for any other public purpose.

H. R. 5498 (Id.) an administration bill provided for sale at appraised fair market value, as determined by the Secretary of the Interior.

S. 1599 (Id.) provided that sales or leases could be made under the Recreation and Public Purposes Act 43 U. S. C. § 869--869-4 and that no payment would be required for any streets dedicated for use of the public or to any qualified governmental agency.

These proposals raise the policy question as to whether lands should be made available at less than fair market value to states and local governments for public purposes, and, if so, how much lower.

When the lands are made available to states and localities and they are not limited to public purposes, some of the recent proposals have been as follows:

S. 1599 provides for sales to governmental agencies at the value of the land.

S. 1600 provided for sales to governmental agencies at fair market value.

S. 1601 provides for sales at two-thirds of the ultimate sale price when lands are resold.

H. R. 106 provides for sale at appraised fair market value based on the classification of the land.

H. R. 255 provides for sale at a negotiated fair market value with priority to state, then to localities and then to private parties, but on a competitively bid price to the latter, not less than fair market value.

It is to be noted that these proposals for sales to governmental bodies when the use is not restricted to public purpose present a rather narrow array of policy choices. As compared to a market value determined by what private purchasers are willing to bid, fair market value may be lower. Value may also vary where payment is not required immediately, where the land is valued for its purpose as classified even though it may ultimately be available for purposes generating higher land values, where the risk of holding the land is removed because the price is keyed to the resale price and where the fair market value is negotiated. All of these proposals, therefore, express a policy of favoring governmental bodies at least to the extent that they do not have to pay the higher of the competitively bid price and the fair market value.

D. Probable Advantages

The proposals for making lands available to states and localities for public purposes is a subsidy to those governments or is an inducement to them to develop land for public purposes of one kind or another. In other alternatives we discuss the lack of consistency in these inducements and subsidies in the present law.

The advantage of giving favorable prices to states and localities to induce them to become land merchandizers depends on whether the

federal policy is to encourage such state and local activity. If it is the federal policy to so encourage states and localities (about which matter an alternative is provided) then pricing at something less than competitive bid prices is probably required as an inducement. None of the particular formulas for expressing the price preference have been studied enough to suggest advantages or disadvantages and in any event the particular formula is dependent on the establishment of a policy principle.

F. Probable Disadvantages

Lands now held for public purposes by federal departments would instead be held and used by state and local governments if a price cutting subsidy or inducement is offered. Some states may be better able to administer such lands in the public interest than the Federal Government and other states may be less able.

Any favorable pricing policy results in losses to the federal treasury assuming there is a market for the lands at higher prices.

To use favorable pricing to states and localities which merchandize the land is a disadvantage only if the federal policy is to discourage such activity by states and localities.

X. ALTERNATIVE 10 — Acreage - Maximum Available for Disposal

A. Summary

Under this alternative statutes would be clarified as to whether acreage maximums are absolute or discretionary and as to whether closely related projects and applicants are or are not subject to the maximums.

B. Issues

In 1959 the Department of the Interior drafted proposed legislation to be popularly entitled the Public Land Urban and Business Sites Act. Since the purposes of the proposal have largely been accomplished by 1964 legislation, (43 U.S.C. § 1421), which include the disposal of lands for urban and business sites, the 1959 proposal is not presented as an alternative. The 1959 ligislation contained a statement as to maximum acreage that might be considered as a model.

The purpose of the proposed statutory language was to state maximums and variations thereof for disposal of lands for urban and business purposes and assumedly to give some discretion.

C. Key Feature

The 1959 Act proposed as to local governmental agencies that no more than 1,280 acres may be conveyed under this section to any one grantee in any one year period for any one project or program, and applications by any one applicant for more than 3,840 acres for any one project or program may not be pending at any one time. (Proposed Act § 2C).

Similarly as to non-governmental applicants the Act proposed: No qualified individual shall obtain more than 1,280 acres under this section in any one year period, and applications by any one qualified individual for more than 3,840 acres shall not be pending at one time. Proposed Act § 3. Similar statutory language unused in S. 1599, 88th Cong., 1st Sess. §§ 4 and 5.

D. Probable Advantages

The statutory language used in the proposal has the advantage, if it is so intended, of indicating that a certain maximum amount of land can be obtained initially (1,280 acres) but that additional acreage for expansion of the project can be made available in subsequent years.

Staged development of land is a customary way of proceeding in large scale development.

E. Probable Disadvantages

The statutory language is ambiguous. What is any one project or program? Are two subdivisions whether adjacent or in different areas one project: Is 3,840 acres the maximum limit? Apparently not, in which case there is no limit. What is a qualified individual? Are closely related persons or corporations one or more than one individual?

For much development planned initially for a large scale it can be best planned if the total available acreage is known in advance. Planning for the possible availability of 3,840 acres when only 1,280 acres (or less) has definitely been made available may be difficult.

XI. ALTERNATIVE 11 – Congressional Action Required for Large or Very Valuable Disposals or Leases

A. Summary

Under this alternative, large tracts of land and very valuable tracts would be sold or leased only by a specific Act of Congress.

B. Issues

Legislation introduced by Senator Bible in 1963 (S. 1601, 88th Cong., 1st Session) provided that when large tracts of public lands were made available that they would be made so available only by Act of Congress. The same issue might be involved when highly valuable tracts are made available.

At some point of magnitude discretion of the Secretaries of the land holding agencies must be limited.

C. Key Feature

The bill provided as follows:

No conveyance of title, lease, or withdrawal for a period of more than ten years shall be made under this Act covering an acreage in excess of five thousand acres except by a specific Act of Congress.

D. Probable Advantages

The matter of line drawing in terms of maximum acreages and values beyond which the Secretary of a land holding department should go might well be specified to avoid abuses of discretion.

E. Probable Disadvantages

Much of the proposed legislation and existing legislation suggests maximums above 5,000 acres, which suggests that under some circumstances a line drawn at 5,000 acres is too small.

There is little evidence that the land holding departments have abused their discretion and conferred unduly large tracts or conveyed highly valuable tracts contrary to the public interest. Until such abuse is shown, maximum suggested amounts of a realistic amount, and discretion to waive the limitations, would appear to be more appropriate.

Many of the competing interests to large or very valuable tract disposals should be identified by the Secretary. There is no showing that the delay involved in a Congressional Act would result in greater protection of the public interest.

The lack of comprehensiveness in present land laws has led to a plethora of special legislation already to cure deficiencies. More special legislation would consume further congressional and departmental time without any corresponding benefit.

XII. ALTERNATIVE 12 — Consolidate and Simplify Laws Relating to Easements and Permits, Particularly for Linear Uses of Land

A. Summary

This alternative would provide a more comprehensive, omnibus law for dealing with rights-of-way, easements and permits for such linear land uses as roads, utilities, pipelines, and transmission lines.

B. Issues

The present law dealing with transportation, utility type transmission uses and communication uses appears in several statutes. These statutes are difficult to administer because each is limited in scope, while some are overlapping and others are either conflicting or obsolete. In 1963, the Secretaries of Agriculture and of the Interior proposed a bill (H. R. 7827, 88th Cong., 1st Sess.) which would consolidate this legislation, fill in gaps and eliminate obsolete provisions. The comprehensiveness of this proposal can be best seen merely by listing the statutes that would be repealed to the extent they conflicted with this proposed new legislation:

1) 43 U.S.C. §§ 932, 934, 935, 937, 938, 939, 946-949, 956-957, 962-965, 952-955, 664, 951.

2) 48 U.S.C. §§ 411-419.

3) Part of 16 U.S.C. §§ 525 and 665.

4) 43 U.S.C. § 959.

5) 16 U.S.C. § 522.

6) 43 U.S.C. § 943.

7) 16 U.S.C. § 524.

8) 43 U.S.C. §§ 944, 966-70, 961,

9) 16 U.S.C. § 523,

10) 30 U.S.C. § 185,

11) 43 U.S.C. § 950.

C. Key Feature

Under this alternative this bill would be enacted. It would include all lands administered by the Secretary of the Interior except Indian lands and the National Park lands and most of the land administered by the Secretary of Agriculture. Each Secretary would be able to permit the use of or grant easements in lands under their respective jurisdiction for purposes such as but not limited to the storage, transportation, and distribution of water, petroleum, or other liquids and gases; the construction, operation, and maintenance of roads, highways, railroads, tramways, and other arteries of transportation and communication; the generation, manufacture, and distribution of electric power and energy (except insofar as the Federal Power Commission has jurisdiction); the transmission or reception of radio, television, telephone, telegraph, and other electronic signals; and the construction, operation, and maintenance of buildings and other facilities related to any of the foregoing purposes. However, the authority under this legislation to permit the use or to grant easements for the purpose of the construction, operation, and maintenance of roads, highways, and tramways would not extend to the Secretary of Agriculture.

Rights over lands held by other Federal agencies affected by air navigation approaches to be granted by the one of the two secretaries required the consent of the other agency. Among other matters, the law authorized the Secretaries to issue regulations to save the Government harmless from damage claims as a result of the uses, required payment at fair market value with exceptions, gave discretion to limit land to that reasonably necessary, permitted multiple inconsistent uses, provided for termination on abandonment, provided for unlimited rights and preferred renewal rights, permitted users to take materials from lands, providing common carrier obligations and provided for other general authority to issue regulations in the public interest.

D. Probable Advantages

1) Provide one comprehensive law to handle many types of uses.

2) Fill in gaps in the law.

3) Eliminate obsolete laws.

4) Eliminate redundant and overlapping statutes.

5) Simplify administration.

6) Maximize cooperation and consistency in application of the laws by the two largest land holding agencies, Agriculture and Interior.

7) In conjunction with a similar omnibus disposal law (which is proposed in other alternatives) this law would go far to simplify and make coherent a present nonfunctional statutory scheme.

E. Probable Disadvantages

None apparent.

XIII. ALTERNATIVE 13 — Purpose and Use - Residential Uses - Multi-family, Condominium and Cooperative Apartment Use

A. Summary

Under this alternative, the Forest Service would encourage multi-family use through condominium or cooperative forms of ownership.

B. Issues

The Forest Service presently does not encourage multi-family use in a condominium or cooperative apartment ownership form, and permits such use only in conjuction with buildings for occupancy needs of the public making reacreational use of lands.

C. Key Features

The Forest Service would discourage single family development and would instead encourage multi-family residential use in condominium or cooperative apartment ownership form.

D. Probable Advantages

Interests would be in space rather than in lands thus reducing the proprietary sense of occupants in particular lands.

Joint ownership would facilitate the development of joint management and other ownership agreements to insure high quality maintenance, and sub-leasing of units for use by general public.

Less land would be devoted to residential use.

Costs per unit of residential use could be varied and could generally be lower per unit as could costs of supporting facilities, costs of maintenance.

User groups would be better organized so as to facilitate cooperative negotiation with Federal agencies.

E. Probable Disadvantages

The felt need of many Americans for single family occupancy could not be satisfied.

Higher and larger buildings would require the imposition of more rigorous building codes and standards.

Investments in particular buildings would be greater and the buildings could not easily be removed, thus leading to a more permanent use of particular sites.

XIV. ALTERNATIVE 14 – Townsite Law Repeal

A. Summary

Under this alternative, only the townsite laws would be consolidated and re-enacted.

B. Issues

In 1959 the Department of the Interior drafted proposed legislation to consolidate, revise and re-enact the townsite laws, which was popularly denominated the Public Land Townsite Act. Forest townsites were not included in the legislation but they might well be, for the problems are similar.

If there are no court cases annotated to a major statutory scheme, the implication is that either the statute is so carefully drafted that there are no problems of construction or that the statute is not being used and no longer has any utility. It is clear from other parts of this study that the latter is true with respect to the townsite laws. While there are many

technical problems with the townsite statutes, they are fundamentally out of touch with modern day state and local government statutes and ordinances for development and with new town development practices. Technical corrections would be inadequate as a fundamental change is necessary.

C. Key Features

The key features of the 1959 proposed legislation were as follows:

1) Local participation by existing governmental bodies and existing and potential occupants in the planning through disposal process.

2) With the exception of national forests, parks, monuments and wildlife refuges and revested forest lands in Western Oregon, the law would apply to all public lands whether or not reserved, though if reserved, consent of agencies other than Department of the Interior subagencies would be required.

3) Lands in private ownership could be made part of the townsite by provisions for donation and exchange.

4) No limitations are imposed on the size of townsites.

5) Sales would generally be a fair market value fixed either by appraisal or competitive bidding. Bona fide occupants would have preferences with some reduction in price using the same standards as in the law for color-of-title claimants (U. S. C. § 1068a).

6) Sites could be reserved for public buildings or facilities and be made available at prices similar to those governing sales under the Recreation and Public Purposes Act (43 U. S. C. § 869 et. seq.).

7) Extensive provisions were included for adjusting rights between mineral interests and townsite occupant interests with a general policy of making lands available either for mining or for townsites, but ordinarily not both.

8) Authority to handle townsites would benerally be delegated to local offices of the Bureau of Land Management.

9) Saving clauses were included to protect vested rights.

10) Three classes of bona fide occupants are described:

a. Persons with rights to possess or occupy lands such as those with homestead entries or mining locations. Such persons could either perfect their rights on the basis of their occupancy or elect a preference under the townsite law.

b. Persons who have rights to possess or occupy that are terminable at will by the Unites States and whose rights cannot be perfected would be entitled to a preference terminable only by a bona fide occupant of the first class.

c. A final class would be those persons who constitute hardship cases who equitably are entitled to a preference.

D. Probable Advantages

Any comprehensive proposal to either repeal or revise townsite laws is probably an improvement over the present system.

Townsite administration would be simplified and adapted to modern needs. Disposal procedures would be more equitable with the legal uncertainties reduced. In addition the development of communities would be promoted.

New towns on raw public land might be authorized by Federal legislation which would incorporate state municipal incorporation, plotting and subdivision laws.

If the standards of these state laws are below the threshold of what Federal policy would dictate, minimum Federal requirements such as those involved in various FHA mortgage insurance and guaranty programs could be imposed.

Other advantages are discussed in Alternative 1 recommending comprehensive legislation and repeal of obsolete laws which lists advantages to repeal of townsite laws.

E. Probable Disadvantages

Since 1959, the evolvement of thought on new towns has been rapid and many agencies are concerned with the problem. The 1959 proposal

should be evaluated in light of the present statutory patterns, programs of such agencies at the Department of Housing and Urban Development, and planned programs of the Federal government.

Special provisions for townsites on raw land may not be necessary in the event of the enactment of comprehensive authority for disposal for new and expanding communities.

The townsite laws do seem conceptually valid insofar as they contemplate townsites on lands already occupied as distinguished from raw lands. As to the former, Federal legislation may be needed so that existing towns and land titles could be upgraded in accord with modern day practices.

XV. ALTERNATIVE 15 — Applicants - State Governments as Agency for Urban and Industrial Development

A. Summary

Under this alternative, lands for urban and industrial development would be made available to the states for their administration and disposal.

B. Issues

Legislation introduced in 1963 (H. R. 106, 88th Cong., 1st Sess.) provided that lands in the states should be classified and if classified for urban and industrial development within ten years it would be appraised to determine its fair market value. The state could then require transfer and payment would be due within ten years or on sale and if no payment within ten years the property would revert.

A somewhat similar bill (H. R. 255, 88th Cong., 1st Sess.) provided that lands not required for any Federal purpose and needed for community development or residential, commercial or industrial development could be so classified and then first the state, then other political subdivisions and finally private parties would be able to purchase. The public bodies could acquire the lands at negotiated fair market value.

Another bill (S. 1601, 88th Cong., 1st Sess.) provided for conditional transfers to state and localities for resale to private parties. The transfer price would be two-thirds the ultimate sale price and payment could be deferred until resale. Conditional transfers would be effective for five years with one five year renewal option.

C. Key Feature

While the three bills are somewhat similar, the first bill appears on its face to make the state the exclusive merchandizer of the lands. It is this feature which makes the bill relatively unique because even the second bill, probably the third bill, and another bill considered in hearings on the matter (H. R. 5498, 88th Cong., 1st Sess.) provided for direct disposal to private individuals as well. The sponsor of the first bill himself testified that he did not mean to suggest that the states be the exclusive merchandizer but that other means of disposal be utilized as well (Hearings on H. R. 106 106,255 and 5498 before the House Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, 88th Cong., 1st Sess. at 60 (1963)).

D. Probable Advantages

Since the problems of disposal of lands for urban development differ from state to state it is better to handle the matter on a state by state basis.

At least some of the states having public lands have state lands and land commissions that could be utilized administratively so as not to necessitate new administrative machinery in the states.

E. Probable Disadvantages

Since some of the states would not have the existing institutions for merchandizing the lands and since other states would not have experience in merchandizing lands for urban purposes, comprehensive Federal legislation might be a more facilitative route.

CHAPTER XVIII

PRINCIPAL PROBLEMS, POLICY CONSIDERATIONS AND ALTERNATIVES

CHAPTER XVIII

PRINCIPAL PROBLEMS, POLICY CONSIDERATIONS AND ALTERNATIVES

I. TRANSPORTATION USES

A. Problem - Mining Access Roads

1. Summary of Problem

The general mining laws provide statutory exemptions which allow uncontrolled development of mining access roads. The result of these exemptions has been destruction of surface resources on Section 10 public lands subject to these mining statutes. Resource needs, both now and in the future, require that these laws be updated for protection of the public lands. The Federal administering agencies have developed and implemented regulations and procedures to adequately control nonmining roads. Lack of statutory authority prevents comparable monitoring of mining access roads except as they come under the Mineral Leasing Act. See Case Study No. 1, Appendix E. There is no statutory authority to control the location and construction of mining roads within the boundaries of a valid mining claim. The confusion comes from the question of whether the access roads to a claim can be construed as a part of the mining operation. If so construed, they are exempt from existing statutes. Further, there is no requirement that the Federal Government be notified of prospecting activities, which may include access roads, or the location of such a claim. Consequently, the problem goes beyond the regulation of access roads and suggests a review of the general mining laws regarding restoration of the land and protection of environmental and scenic values.

2. Policy Consideration

The primary impact of the proposed alternative would be the protection of the land resource from abusive development practices under the general mining laws. The legislative modification proposed herein would affect only that portion of the mining laws which governs road use.

Such legislation would provide relief to only one aspect of the broader problems resulting from existing statutory limitations. However, legislative recommendations for mining access roads should be one facet of a review of the entire complex of laws governing mining operations. For effective multiple-use management, the general mining laws need to be modified to provide congruence with statutes governing land uses other than mining.

Another limiting feature is that the Federal Government, as proprietor, has been deprived of regulatory powers equivalent to those of other land administrators. Absence of control over mining roads by state or private landowners is generally due to enforcement or neglect, rather than because such control is prevented by law, as is the case with public lands. The enactment of legislation to authorize control over mining access roads would restore to the Federal agencies their rightful powers of controlling use of lands within their jurisdiction. This power is mandatory for any effective and organized multiple-use management program.

Further, responsibility of the user for his impact on the lands is an inherent aspect of public land policy. Users subject to the general mining laws have not been required to accept this responsibility.

B. Alternative 1 - Mining Access Roads

1. Summary

This alternative proposes to amend the general mining laws to provide authority for the Federal agencies to control the location and construction of mining access roads.

2. Issues

There is a confusion as to whether adequate statutory provisions are available for control of access roads to mining operations subject to the general mining laws. Consequently, the development of such roads has, in many instances, resulted in destruction of natural resources on public lands (e.g., soil erosion, destruction of watershed, etc.). This problem appears to be broad base across mineralized areas of the Western States. For example, problems of this nature have been found in California, Colorado, and Arizona.

The Federal agencies which administer the lands have demonstrated the ability to control and regulate mining roads where appropriate authority exists. For instance, under the mineral leasing laws, which provide such authority, lease provisions and departmental regulations have been developed which protect surface use of the lands, the resource and the environmental values.

3. Key Feature

Enact legislation which will remove the exemptions on Federal control of mining access roads now provided by the general mining laws. Without this exemption, mining roads would be subject to existing regulations which govern other roads across Federal lands.

4. Probable Advantages

The principal advantage of this alternative would be to extend Federal control over mining operations to all access roads occupying Section 10 lands. This would enable the agencies which administer the lands to regulate location and construction of these roads. The effect would be to prevent further disruption to the natural resource in terms of soil erosion, destruction of watershed, etc. Further, it would eliminate the preference treatment of a particular user of public lands.

5. Probable Disadvantages

The most evident disadvantage of the alternative is that the proposed legislation would provide only a fragmented solution to the inadequacies of the general mining laws. The mining access roads are only one example of resource abuse under these laws and a broader statutory review than proposed herein would be needed for a comprehensive solution. There would be disadvantages to the mining operators as it would increase their cost of exploration and mining.

A. Problem - Depletion of Timber Producing Land by Electrical Transmission Lines

1. Summary of Problem

Increasing demands for power supply are requiring increased land acquisition for right-of-way purposes. In much of the heavily forested Northwest, for example, the shortest route from power source to user is across forested lands. Over much of this route, all timber in the path of the power line is cleared, as well as a "danger tree" zone.[1/] Consequently, this utility use has a significant impact in terms of depletion of the timber resource and resultant economic and aesthetic losses. Although actual acreage of commercial timber on Section 10 land has been undeterminable, for the Departments of the Interior and of Agriculture combined there was an increase for this use from 69,730 acres in 1963 to 106,183 acres in 1965 on various types of land. Further, on Forest Service lands utility transmission line use has increased from 11,544 acres in 1959 to 74,670 acres in 1965. No data was available for later years.

From Case Study No. 2 in Appendix E, it is evident that there is no joint or coordinated planning between the power supplier and the resource manager prior to location and construction of a utility line which must cross public land. Further, there is no specific legislation to require such planning and coordination. Under existing authority and pursuant regulations, the resource manager has a voice only after the route has been tentatively selected by the utility and quite firmly fixed by the acquisition of the rights-of-way along the proposed route on adjacent lands.

2. Policy Considerations

Legislation to require joint planning between users of the lands and the resource managers would (1) minimize depletion of the land removed from commercial timber production, (2) establish a framework for joint planning between the private sector as user and the Federal Government as proprietor, and (3) set a prerequisite for authorizing use of public land for utility line purposes.

Reference No. _____

CR

1. Summary

This alternative proposed legislation to require that power suppliers enter into preliminary planning with timber resource managers in advance of the selection of routes for power transmission lines approaching and crossing public lands.

2. Issue

Power line rights-of-way which must cross public lands are not being constructed on a location which would minimize the timber producing lands removed from production. Existing statutes do not assure planning of utility line approaches to public lands which virtually predetermine the route the lines must follow across the public lands.

The public land agencies have no involvement with the right-of-way applicant until a preliminary route has been selected, at which time the specific conditions of this route are negotiated. Optimal conservation of the timber producing land as well as other resources would warrant coordinated planning by the user and the landholder and at the earliest possible opportunity (i.e., when need to cross public forested land is first discovered, and prior to preliminary route determination).

3. Key Feature

Provide legislation requiring the power suppliers to enter into negotiations with the forest resource manager prior to route selection. Further, such legislation and subsequent regulations should (1) specify the criteria for evaluating the impact of the right-of-way on the forest lands, and (2) apply to the Department of Agriculture and Department of the Interior, which administer forested public lands.

4. Probable Advantages

Potential benefits from this alternative are optimum conservation of the timber producing land. Prevention of unnecessary reduction of timber producing land would benefit the public in furthering the National objective of maintaining an adequate timber supply. It would further benefit the national public in providing the opportunity for optimum planning of resource utilization and protection of public lands. It would support the regional objective of conserving the resource base which supports the local timber industry.

Reference No. _____

5. Probable Disadvantages

Legislation of this type (to promote prescheduling) may not be readily enforceable. It would be more likely that the utilities would attempt a waiver of this ruling by pleading immediate necessity based on demand for power. This alternative could also result in higher costs to the user for construction of transmission lines in some instances which might be reflected in higher costs charged the consumer.

C. Problem - Electric Transmission Right-of-Way Related to the Small Tract Act

1. Summary of Problem

The regulations promulgated by the Bureau of Land Management, implementing the Small Tract Act, provide for the dedication of a right-of-way to be utilized for transportation and public utility uses. The related Bureau of Land Management classification order, however, limits users to Federal, state or local government entities, or agents thereof, and public utilities. Under these rulings, investor-owned utility companies may utilize this right-of-way but must make application to the Bureau of Land Management for additional right-of-way under another Act, as well as obtain easements from private patentees. The result is a delay in providing a public utility to Small Tract customers plus administrative cost incurred by the utility company and the Bureau of Land Management. The magnitude of this problem has been undeterminable, but it could be a problem in many areas where small tracts are disposed. A significant amount of land, over 142,000 acres, was disposed under the Small Tract Act between 1958 and 1967.

2. Policy Considerations

Since there are no stipulations in the Small Tract Act regarding utility use, there is no concern with statutory modification. Rather, the problem appears to be with the Bureau of Land Management classification order. Clarification of the regulation and classification orders to include all public utility companies, including investor-owned, would eliminate need for additional rights-of-way and the costs incurred in providing them. In addition, it would benefit the public by providing faster utility service.

D. Alternative 3 - Electrical Transmission Right-of-Way Related to Small Tract Act

1. Summary

Modification of Department of the Interior classification orders to allow electric utility companies to use rights-of-way dedicated under the Small Tract Act.

2. Issue

The Small Tract Act authorizes the Secretary of the Interior to provide regulations for disposal or lease of up to 5-acre parcels of land "chiefly valuable for residence, recreation, business or community site purposes." The regulations promulgated under this act are found in the Code of Federal Regulations Title 43, Chapter II, Subpart 2233, which states that "a classification order provide for rights-of-way over each tract for street and road purposes and for public utilities."

The Classification Order (No. 465) issued in conjunction with this regulation provides that "such rights-of-way be utilized by the Federal Government, state, county or municipality in which the tract is located, or by any agency thereof."

Investor-owned utilities have no rights under this classification order and are thereby deprived from using this dedicated right-of-way. They must, instead, obtain easements from small tract patentees as well as rights-of-way from the Bureau of Land Management in order to provide electrical service to their customers.

3. Key Feature

The intent of the dedicated right-of-way referenced in 43 CFR 2233 is that it be available for transportation and public utilities use. The Department of the Interior should revise the classification order to read:

> "such rights-of-way be used by the Federal Government, state, county or municipality in which the tract is located, or by any agency thereof, or by investor-owned utility companies."

4. Advantages

This alternative would (1) allow investor-owned utility companies to make use of the dedicated right-of-way without having to obtain additional right-of-way; (2) enable the utility companies to provide faster service to their customers; (3) bring the regulations in line with the intent of the dedicated right-of-way, which is to provide right-of-way

for public utility service; and (4) do away with related processing expense associated with the filing of a right-of-way application on the part of the utility companies and the Bureau of Land Management and the related permit cost to the utility company.

5. Disadvantages

May permit utility companies to utilize rights-of-way without control by either the local governing body or the Bureau of Land Management to avoid objectionable placements.

E. Problem - Authority to Promulgate Compulsory Wheeling as a Means of Marketing Surplus Federal Power

1. Summary of Problem

The problem of population growth and the increasing consumption of electricity per capita confronts all electric utilities. Unlike other industries, the electric utility cannot inventory kilowatt-hours. If the investor-owned electric companies are to continue to be a major contributor to growth of local, regional and national economy and fulfill their obligations to be ready and able to supply reliable electric service at the lowest possible cost, all electric utilities must continue to build new electric power plants, transmission lines, etc. To accomplish this, it is necessary to use the public lands.

In absence of clearly defined authority by Congress, the Secretary of the Interior has assumed responsibility for the power marketing program of the United States and has, under this premise, promulgated regulations which require stipulations agreeing to use by the Government of a utility company's surplus capacity as a condition for rights-of-way across public land. Contention has arisen over the Secretary's authority over the power marketing program and hence his authority to promulgate the aforementioned regulations.

The Constitution of the United States (Article IV, Section 3, Clause 2) places in Congress the power to dispose of and make all needful rules and regulations respecting the disposition of public lands. In the execution of this power, Congress, by the Acts of 1901 and 1911, directed the Secretaries of Agriculture and the Interior to grant rights-of-way for electric transmission lines across public lands which are administered by the agencies under their control, upon application subject only to certain general conditions designed essentially for the preservation and protection of the public lands. The intent of these Acts was to encourage the construction of electric transmission lines as an aid and impetus to the growth of the American economy. These regulations, instead of encouraging, may have discouraged the construction of new

electric transmission lines, and thus thwarted the will of Congress to the detriment of the electric energy consuming public in terms of reduced reliability and increased power costs. Numerous cases were found where utility companies, at increased cost, have rerouted their lines to avoid crossing public lands. This is particularly shown in the southeastern portion of the United States where public lands can be more easily avoided than in the West.

At present, confusion and inconsistencies exist with the Federal Government's policy on Federal power. On the one hand, it appears that Congress has established guidelines and limitations on the authority vested in the Federal Power Commission through the Federal Power Act of 1920. In contrast, there is no single legislation which establishes guidelines as to the Department of the Interior's involvement in the Federal power field.

It is not clear whether the Bonneville Act of 1937, the Fort Peck Act of 1938, and the Flood Control Act of 1944 were intended to give general authority to Interior to market surplus Federal power through compulsory wheeling conditions or whether they were intended to relate only to the specific circumstances of the acts. The latter would appear to be the case (e.g., the Flood Control Act of 1944 designates the Secretary of the Interior as the marketing agent for surplus power generated at dams under the control of the Department of the Army).

The only description of the general authority for the Department of the Interior to operate in the power field is expressed in a Memorandum of Understanding dated March 4, 1964 between the Secretaries of the Interior and Agriculture where an effort was made to define "the power marketing program of the United States":

> "For the purpose of this Memorandum of Understanding, except where otherwise provided by law, 'the power marketing program of the United States' refers to undertakings by the Department of the Interior, necessary or appropriate for the purpose of making electric power and energy at federal multipurpose projects constructed or under construction by the Bureau of Reclamation or by the Corps of Engineers, available in wholesale quantities to agencies designed by existing law as preference agencies and to other purchasers of electric power and energy at wholesale, or for the purpose of interconnecting those projects with other electric facilities, pursuant to the Bonneville Project Act, the Reclamation Project Act of 1939, the Flood Control Act of 1944, or other applicable marketing authorization."

This definition of the "power marketing program of the United States" would not seem to be a sufficient indication of limitation and standards upon which a utility company requiring access across public lands could commit a substantial investment in the design and construction of a utility system. In contrast, the licensing provisions of the Federal Power Commission clearly define its limitations, jurisdiction, and the standards to be met by licensees.

Question over the authority to promulgate compulsory wheeling is suggested by the fact that when Congress was considering legislation later enacted as a part of the Federal Power Act of 1920, the House rejected an amendment that would have required transmission lines crossing public lands to serve as common carriers. That amendment read as follows:

> "Provided further, that the right to use rights of way through the public lands of the United States, including the national forests, for lines for the transmission of hydroelectric power or energy shall be upon the express condition that such lines shall be constructed, operated, and maintained as common carriers, and no right to use public lands, including the national forests, for the transmission of hydroelectric power or energy shall hereafter be given, except under and subject to the provisions, limitations, and conditions of this proviso." (53 Cong. Rec. 742).

The problem is compounded by the fact that there are no definite standards as to what constitutes "surplus" transmission capacity, and how its existence is to be determined and measured. In this regard, the regulations appear to disregard the technical problems of power transmission.

2. Policy Considerations

Any legislation to define the role of the Department of the Interior in marketing Federal power would require examination and congressional clarification of the jurisdiction and relationship between all Federal agencies engaged in the development, distribution and regulation of electrical power. Congress has already established policies with regard to the development and improvement of power transmission across streams and water bodies under the jurisdiction of the Federal Power Commission. It is important for Congress to also review and clearly define the policies of the Federal Government in relation to the use of public land to transmit electric power.

F. Alternative 4 - Authority to Market Surplus Federal Power

1. Summary

Enact legislation to define the Department of the Interior jurisdiction and authority to act as the marketing agent of surplus Federal power.

2. Issues

The Secretary of the Interior presently draws his primary authority to market surplus Federal power from Section 5 of the Flood Control Act of 1944 (16 U.S.C. § 825s). The Bonneville Act of 1937 and the Fort Peck Act of 1938 also authorize the Department of the Interior to provide reasonable outlets for Federal power generated by the Bonneville Power Administration and the Bureau of Reclamation. While these acts are sufficient to indicate that the Department of the Interior has a responsibility to market surplus Federal power, these is confusion as to (1) the extent of jurisdiction, and (2) the standards or limitations placed on the Secretary of the Interior with regard to carrying out this responsibility. The licensing provisions of the Federal Power Commission, on the other hand, clearly define its limitations, jurisdictions, and the standards to be met by licensees.

3. Key Feature

Legislation would be enacted to (1) clearly define the Department of the Interior's authority to act as marketing agent of Federal power, and (2) specify standards and limitations as to Interior's jurisdiction regarding Federal power.

4. Advantages

Congressional policy regarding Federal power would be clearly defined. The relationship between and jurisdictions of the Department of the Interior and the Federal Power Commission would be established. The relationship between the Department of the Interior's role as manager of public lands and as marketing agent of Federal power would be clearly defined. Conflicts would be reduced between the managers of public lands and the users of public lands.

5. Disadvantages

None apparent.

G. Alternative 5 - Authority to Require Wheeling Stipulations

1. Summary

The regulations issued by the Secretary of the Interior for granting rights-of-way (43 CFR 2234), requiring as a condition that the grantee will transmit Federal power over the excess capacity of his lines, would be redefined through congressional action.

2. Issues

The issue in this alternative is whether the Secretary of the Interior should have authority, which has not been heretofore defined in the statutes, to establish "common carrier" type conditions for the granting of rights-of-way across public lands. The regulations promulgated under 43 C.F.R. § 2234 that each utility receiving a right-of-way across Federal land for utility lines with voltages in excess of 33 kilovolts must (1) allow the Department of the Interior to interconnect with its transmission facilities, and (2) permit the Department to utilize what it determines to be "surplus capacity." There is question whether such broad undefined conditions are a reasonable exercise of authority granted under the Acts of 1901 and 1911, and the Acts of 1937, 1938, and 1944 supra.

Further, there appear to be no limitations or standards upon which the Secretary can declare the capacity of a transmission line to be "surplus." No determination is made of the amount of surplus capacity that may exist in a transmission line at the time of the signing of the stipulations by an applicant and the subsequent granting of the right-of-way by the Secretary. Such determination is made only at the time the Secretary decides to exercise his authority to wheel Federal power over a particular transmission line. The exercise of this authority requires only a 30-day notice. The utility company affected, having no standards upon which to judge how much capacity the Department of the Interior will need and when, cannot adequately plan its utility system.

3. Key Feature

Legislation would be enacted to define the authority of the Department of the Interior regarding the wheeling of Federal power and acceptable standards and limitations on this authority would be outlined.

4. Advantages

The problems arising from regulations governing the rights-of-way for private transmission lines across public land would be alleviated by establishing congressional standards which would achieve the long-term objectives of the Federal Government and the private utilities.

5. Disadvantages

Depending upon the nature of the congressional action there could be a disadvantage to the Department of the Interior in terms of cost of delivery of power to preference customers and corresponding increases to all consumers through general increase in rates. The same could be said concerning a disadvantage in terms of increased cost to the utility company and its customers if Congress should uphold the present regulations.

H. Variation No. 5A

1. Key Feature

The present regulations would be amended to specify a limit on the period of time in which Interior has the right to exercise its authority to use a utility's "surplus" capacity. Further, it would require Interior to make projections as to the needs of its customers and use these projections to estimate the amount and timing of the need for surplus capacity. This would be specified at the time the stipulations were signed rather than when Interior decides it requires the use of the surplus capacity.

2. Advantages

This would alleviate the problem of lengthy discussion and debate which is synonymous with congressional legislation.

3. Disadvantages

It would not clearly define the Federal Government's policy for the marketing of Federal power. The confusion and conflicts between the Federal Government as proprietor of the public lands and the public land users would remain.

I. Problem - Uses Granted Under the Act of 1911

1. Summary of Problem

There is confusion as to whether electrical plants and substation sites are permitted under the Act of 1911 (43 U.S.C. § 461). While the Forest Service interprets the Act to allow such uses the Bureau of Land Management has never established a definite policy.

2. Policy Considerations

The inconsistencies between the two major land administering agencies concerning authority granted by the Act of 1911 creates uncertainties with the public land users as to their rights under this act. Further, this confusion appears to be unwarranted with no public benefits derived therefrom. Clarification of this issue would be in the public interest in that the Federal Government is obligated to administer the public lands as efficiently as possible.

J. Alternative 6 - Uses Granted Under the Act of 1911

1. Summary

The Act of 1911 would be amended to allow the granting of easements for substation sites and electrical plants.

2. Issue

The policies of the Forest Service and the Bureau of Land Management are inconsistent with regard to the interpretations of the uses granted under the Act of 1911. The Forest Service allows easements to be granted on Forest lands for substation sites under this Act although the Act refers specifically only to transmission lines. The Bureau of Land Management has not considered substation sites applicable under the Act of 1911, but only to the Act of 1901 which specifically authorizes substation sites. A special exception, however, was granted in Nevada in November of 1966 as indicated in Chapter XV. Due to uncertainty of tenure under this Act, however, utility companies prefer to obtain substation sites under the Act of 1911.

2. Key Feature

The Act of 1911 would be amended to include the use of public lands for electrical plants and substation sites under the same 50-year tenure as provided transmission lines.

3. Advantages

This alternative would benefit the public land user by providing consistent policies among the two agencies. In addition, the public utilities would be assured that the tenure would be consistent with the substantial investment required for substation sites and electrical plants. Further, this alternative would assure equal treatment among utility companies and avoid the necessity for special exceptions as was granted in Nevada.

4. Disadvantages

None apparent.

III. RESIDENTIAL USES

A. Problem - Vacation Homes Pricing Policies and Tenure

1. Summary of Problem

The problem of vacation home use of public lands is primarily related to the Forest Service since over 90 percent of all permits are on National Forest lands. There is great demand for public recreation areas to serve the general public. In contrast, the benefits of vacation home sites on these public lands are enjoyed by a very small sector of the population.

Vacation home sites were located on Forest Service land in the 1920's when the population did not have its present mobility. As a result only the most accessible and choice land was chosen for vacation home sites, usually on lake and river frontage. These potential recreation areas could serve a much larger public if converted to public recreation areas and campgrounds. The problems occur when attempts are made to convert these sites to greater public benefit.

The primary problem is recapture of the land. The majority of vacation home permits are terminable but with no stipulated tenure or expected termination date. Indefinite tenure hinders long-range planning for reuse of these sites. Without a definite recapture date, the Forest Service cannot implement plans for developing the land for greater public benefit, nor can it rotate the benefits of vacation home use to other sectors of the population.

Current permit holders feel their rights are in perpetuity. Any attempt by the Government to terminate this use results in the permittees exerting pressure on Congress to provide compensation for improvement and even to allow acquisition of title to the land by sale or property exchange. Additionally, indefinite tenure interpreted as tenure in perpetuity helps generate resale of improvements at speculative prices that are prohibitive to many potential permittees. When tenure is uncertain, permittees tend to feel and act with indecision about maintenance, repairs and improvements, sometimes resulting in deterioration of the improvement and the surrounding environment.

The second major problem area associated with vacation home use of public land is related to permit fees. Until recently the fees charged by the Forest Service for this use have not been competitive with current fair market value or private charges for similar sites. Although a General Accounting Office order was issued in 1965 requiring that fee

permits on Federal land be assessed at fair market value, the Forest Service chose to stage the increases over 5 years. Consequently, 1970 fees will not reflect current market value, but 1965 market value.

This pricing policy has resulted in a situation where Federal administration costs have exceeded the revenue received from vacation home use. As a result the general public bears the tax burden of subsidizing an essentially private use of public recreation land without benefit of public use of that land.

2. Policy Considerations

Vacation home sites are located in prime recreation areas. It would appear that the greatest public benefit can be derived only through a program of Government retention and management of this land. Whatever legislation is enacted or policy changes initiated with regard to vacation homes, Congress and the Federal agencies, particularly the Forest Service, must carefully consider how best to serve public needs. Much pressure has recently been brought to bear on Congress to enact legislation which will protect the rights of vacation home permittees.

B. Alternative 7 - Vacation Homes Pricing Policies and Tenure

1. Summary

Termination of all permits for vacation home sites, with Government retention of the land.

2. Issues

The initial objective of vacation home permits was to attract the general public to the forest and acquaint them with the recreation use and enjoyment of this resource. Present policy, however, is to hold vacation home use as the lowest-priority recreation use permitted in the multiple-use concept as it yields the lowest general public benefit. Although no new site permits have been issued for several years, terminations of existing permits are occurring at a very slow rate. This is due to the fact there is no stated tenure in 64 percent of vacation home permits, making them tantamount to permits in perpetuity with little hope for recovery for greater public benefit.

In addition, administration costs exceed revenue received because fees charges have not been competitive with current market value. While the General Accounting Office policy of 1965 requires that all fee permits of Federal land be assessed at current market value, the Forest Service staged the fee increases over a 5-year period so that by 1970 the fees will again be below current market value.

Indefinite tenure and increased permit fees have resulted in pressure on Congress, by permittees and their representatives, to acquire title to the land by sale or exchange. If this happens, the general public will suffer loss of benefit of recreation areas that can be developed only if the Government retains the land.

3. Key Feature

Legislation would be enacted giving a final date of occupancy for existing vacation home permits and prohibiting further issuance of vacation home permits. In addition, transfer to another permittee with attendant resale of the improvement will be prohibited. The General Accounting Office fee policy would be strictly enforced with annual fees increased to current fair market value subject to updating every 5 years.

4. Advantages

Assurance of recovery of the sites and retention of ownership of the land by the Government for public benefit would be the major advantage of the implementation of this alternative.

The cost of administration of permits for this use would be eliminated, once the sites are recovered. In addition, strict enforcement of the General Accounting Office fee policy will provide greater revenue which can be used for future development of the recovered sites.

All misunderstandings about tenure, terminations, compensations, and any other conditions would be eliminated, and at the same time adequate termination notice would prevail in accordance with good leasing principles of relating term to investment required.

The criticism of the program favoring a few would be eliminated.

Private land holders whose properties were suitable for similar use would not be faced with competition from the Government in the marketing of their land at below-market costs.

The Government, through inadequate operating policies, would not continue to sponsor a program permitting speculative resales of improvements on Government-owned land.

The land would be readily available for reuse under better conditions of planning and cost accounting procedures.

5. Disadvantages

The Government may experience pressures and litigations and other actions from existing permittees to delay the implementing of this alternative.

C. Variation No. 7A

1. Key Feature

Term permits would be issued for all existing vacation home sites, effective for a stipulated single term of 25 years with no extensions or renewals. At the end of the specified term, vacation home sites not required for higher-priority use would be rotated to new permittees through scheduled public offerings. The condition under existing permits requiring that vacation homes not be used for year-round residency would be eliminated in areas where services are not a problem. Further, this program would provide for normal termination of 20 percent of the sites at 5-year intervals.

2. Advantages

This alternative would provide for retention of Government ownership of vacation home sites, thereby assuring that land will be available for public use and benefit in the future. The recovery of 20 percent of the sites at 5-year intervals would simplify recovery for reuse and eliminate the present cumbersome requirement of 10-year notices of termination. The statement of definite tenure in the permit would also help to overcome the present problem of permittees not understanding the need to amortize the cost of their improvement as a recreation expense over the authorized years of occupancy.

The condition in the operation plan for the 5-year phasing of terminations and the subsequent public offering of permit sites at 5-year intervals provides an adequate interval for the collection and evaluation of operating data on which to base changes in supply, in rates, and in other policies. Such changes are presently based on arbitrary decisions and subject to existing pressures rather than facts. This solves the problem of long intervals between updating which has previously existed.

This alternative would be an advantage to the Government as a proprietor in that the charges for rotated permits to a second permittee would be based on the land and the improvement.

The possibility of Government subsidizing of a private use of land for recreation purposes would be eliminated, thus relieving the general public of any obligation to benefit a selected few.

6. Probable Disadvantages

Pressures and litigations may be experienced in the phasing out of present permits in order to put the new program into operation. Present permittees who have misconstrued their rights to 99-year tenure will be disappointed; so will present permittees who are seeking title to their sites through land exchanges.

D. Variation No. 7B

1. Key Features

Legislation would be enacted to authorize disposal of all vacation home sites and adjoining areas. Policies for the administration of such disposal would be established.

2. Probable Advantages

The alternative would open the way for permittees to organize and purchase existing vacation home tracts for resale of occupied parcels to the owner of the improvement. This would satisfy their desire for ownership and would ameliorate their discontent over amortizing the cost of their improvement for recreation expense.

Sale of the land would open an opportunity for acquisition of choice sites to the general public. Disposal would end the administrative problems and costs of the present program from the standpoint of the Government. Disposal could also solve the problem of desire for ownership and misunderstanding of leasing experienced by permittees.

Private ownership of these sites would eliminate the problem of Government competition at subsidized rates for private owners of similar lands who have been unable to market them at fair market prices.

3. Probable Disadvantages

Choice recreation-oriented sites would be lost for public use, by present and future generations. The alternative is incompatible with the experience of other agencies that holding of recreation-oriented lands not needed immediately is the highest and best use of the land.

The price received for the land would not be adequate for reacquisition of the sites if it were determined they were needed for public purposes in the future.

Disposition of tracts within Federal lands would promote further intermingling of private ownership, especially within National Forests, and thereby decrease the efficiency of total management of the balance of Federal land in these areas. Disposition could also serve to decrease access to other areas of Federal lands.

If the public were aware of the implementation of this alternative, they would be apt to judge it as continuation of a favored few at the expense of public benefit.

E. Alternative 8 - Rights on Terminations of Vacation Home Uses on Section 10 Lands

1. Summary

This alternative would require payment for improvements on termination of occupancy rights.

2. Issues

The scope of the rights of users of Section 10 lands on termination of the use have continued to be a matter of controversy. For example, the Federal government has generally taken the position that the only right on termination of a vacation home site which has been occupied for a reasonable period of time is the right of removal of the improvement. However, vacation home permittees have taken the position that on termination, compensation should be paid for the fair market value of the improvement and have introduced legislation to that effect.

A bill applying to lessees or permittees on Bureau of Land Management lands was introduced in the 91st Congress (H.R. 12169, 91st Congr., 1st Sess.). While the bill applies to any structure, fixture, or improvement, the possessory interest shall not be construed to include any right to engage "in any business or other commercial activity." This provision may be intended to make the provision applicable only to residential uses, though it is also construable as an attempt to remove any implication that the possessory interest changes any rights as to type of use.

Hearings on H.R. 8070 Before the Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs, U.S. Sen. on Public Land Laws, 88th Cong., 2nd Sess. at 84 1964 indicates that "because of the widespread demand for the use of public domain lands in our buildup for World War II, the act of July 9, 1942 (56 Stat. 654) provided that whenever grazing permits were terminated because of defense utilization,

the permittee or licensee would be paid for all his losses. However, there is no general law to permit similar payment of losses in situations where land is taken for other public use."

3. Key Feature

Through legislation, compensation at fair market value of improvements still having value when occupancy rights are terminated would be granted to the permittee.

4. Probable Advantages

Permittees would construct higher quality improvements. Section 10 lands would be subject to market forces more similar to private lands. A fair market value pricing policy for sites would be easier to establish. Certainty would be promoted by removal of theoretical Federal power to terminate which has been often threatened but seldom exercised because of substantial resistance by permittees.

5. Probable Disadvantages

The cost of returning lands to availability to the general public would be increased. It would be contrary to normal leasing practices where improvements are amortized over the life of the lease term.

IV. NEW AND EXPANDING COMMUNITIES

A. Problem - Pricing Policy Regarding Land for Public Uses

1. Summary of Problem

The Recreation and Public Purposes Act allows below market rates for public purposes on lands administered by the Bureau of Land Management. The pressures, however, for public lands for public purposes are not confined to Bureau of Land Management lands. For example, in the cast study presented for Flagstaff, Arizona in Chapter XI, Expanding Communities, a public benefit would have been served if the Forest Service had been able to dispose of land under the Recreation and Public Purposes Act. However, no legislation exists to allow disposals by other agencies at below market rates to potential users of other Section 10 lands. Consequently there is an inequity regarding purchase of public lands for public purposes.

2. Policy Considerations

Legislation expanding the application of the Recreation and Public Purposes Act to all agencies administering Section 10 lands would have the effect of broadening the base of public lands available for public purposes at below market price. Further, by giving all agencies similar authority, there could be an even greater impact on public land policy. For example, the section Resource Use Relationship showed that the functions and responsibilities of the various agencies as public land managers are quite similar, as are the problems of multiple use management. Consequently, concepts of multiple use classification, priority rankings, and utilization of public lands for maximum public benefit must, if they are to be realized, transcend agency jurisdiction.

The Federal Government in its role as proprietor has the obligation to the general public to be consistent in its policies concerning land disposal and use for similar uses. An expanded Recreation and Public Purposes Act would be a step in this direction.

B. Alternative 9 - Pricing Policy Regarding Land for Public Use

1. Summary

Amend the appropriate portions of the Recreation and Public Purposes Act to authorize below market sales on all Section 10 lands for all legitimate public purposes.

2. Issues

For uses needed by new or expanding communities adjacent to Section 10 lands other than those administered by the Department of the Interior, there is no general provision for disposal of land for public purposes suitable for disposal at below market rates. Thus, the communities adjacent to public lands other than Department of the Interior lands are at a disadvantage in acquiring public land needed for public uses such as parks, schools and other public facilities at below-market rates. For example, several communities have been placed at a disadvantage when they happen to be near National Forest lands as opposed to communities located near Bureau of Land Management land.

3. Key Features

Provisions of the Recreation and Public Purposes Act would be extended to all Section 10 lands. Pricing policy under this Act would be reexamined and public purposes redefined.

4. Probable Advantages

Passage of this legislation would enable state and local governments to acquire federally-owned, Section 10 land administered by several departments at below fair market value.

An expanded disposition program of this kind could be thought of as direct aid to local governments – analogous to many of the existing Federal aid programs such as is provided higher education facilities.

Expansion of the Recreation and Public Purpose Act to all Section 10 lands is a positive step in the direction of providing for efficient disposal or use of lands more suitable to higher uses which also serve local public purposes.

Communities which are near public lands under the Department of the Interior and which have need for land for public purposes would not be favored with lower land costs than communities near land under other jurisdictions.

The most direct advantage of the expanded Recreation and Public Purpose Act, of course, would be benefits to the regional public and local groups. Availability of usable Federal land for legitimate public purposes would allow either a lower local tax burden, or reallocation of current taxes to other worthwhile endeavors.

5. Probable Disadvantages

Amendment of the Recreation and Public Purposes Act would mean loss of revenue from sale of lands by various agencies of the Government that presently sell at fair market value. From a proprietary standpoint, this is an obvious disadvantage.

This is a disadvantage to the general public inasmuch as there is a reduction in receipts to the treasury upward pressure for higher taxes.

C. Alternative 10 - Meaning of Public Purpose and Public Uses

1. Summary

This alternative would provide a definition of public purpose and public use.

2. Issues

Some statutes such as The Recreation and Public Purposes Act (43 U.S.C. § 869) indicate that lands may be disposed of for "public purpose." The meaning of public purpose is not clear. Other statutes such as the Public Land Sale Act of 1964 (43 U.S.C. § 1421) permit disposal for "public use or development." The meaning of that phrase is not clear especially in relation to the term "public purpose."

A public purpose or a purpose of public use or development might be any use for which state and local governments or a nonprofit corporation could use land. In other contexts it could mean any legitimate

purpose. And in still other contexts it could mean use of land where no one person or private corporation could exclude the general public. What it should mean or whether it should mean all of these things depending on the context is a matter of policy.

3. Key Features

Legislation would be enacted to clarify ambiguities in existing legislation as to the meaning of public purpose.

4. Probable Advantages

Clarification of the meaning of public purpose would eliminate questions as to whether the statutory phrases "public purpose" and "public use and development" have different meanings. It would assure a consistent policy, thereby avoiding the possibility of favoring one applicant over another.

5. Probable Disadvantages

There is some merit in leaving the terms undefined, since public purpose and public use and development are similar to the "public use" and "public necessity" doctrines in eminent domain. Consequently these doctrines are capable of expansion.

D. Problem - Forest Service Land Disposal Procedures

1. Summary of Problems

One objective of the Forest Service is the consolidation of National Forest land to increase its management efficiency. The primary method used for achieving this objective is through exchange. Where lands are needed for urban occupancy uses lands are disposed of through exchange procedures. This accomplishes the dual objectives of disposal for higher uses and consolidation of National Forest lands. While other disposal procedures are available they have not proven to be workable.

The exchange procedure is cumbersome and time consuming. Lands of equal value or equal acreage to be used in an exchange are not always easy to find. Further, the procedures for review are lengthy and may require numerous reappraisals. This may not only hamper orderly disposal, but may hinder the process of consolidating National Forest lands.

Another method of disposal open to the Forest Service is through use of Surplus Property procedures. Land returned to the Bureau of Land Management is then classified by the Bureau of Land Management for retention or disposal. Two problems arise with regard to disposal by this method. First, there is no guarantee that the land will be classified by the Bureau of Land Management for disposal so that the intended recipient can acquire it. Secondly, no monies are received by the Forest Service for this type of disposal and nothing is accomplished toward the objective of consolidating the National Forests as would occur through exchange. This option is seldom exercised by the Forest Service.

Another means of disposal available to the Forest Service is the Townsite Act of 1958 (16 U.S.C. §§ 478(a)). This act specifies that the Chief of the Forest Service can designate for townsites land to meet urban needs for residential or business purposes that cannot adequately be met by other means. There is no record, however, of any townsites having been designated under this Act in the 11 years it has been in effect. This is due to the restrictive nature of the Act. For example, not less than 5 acres nor more than 640 acres can be considered in any one application for addition to an adjacent, existing town. For a completely new town, the minimum is 40 acres and the maximum 640 acres. Further, areas designated as townsites are divided into town lots and offered for sale. Not more than three lots, however, may be sold to any one person. Since this Act is not utilized, the Forest Service does not have a direct sale provision by which to effectuate disposals to meet urban needs.

2. Policy Considerations

The primary functions of the Forest Service have been the protection, management and utilization of land of the timber, water, wildlife, recreation and range resources. Between 1958 and 1967, however, the Forest Service has disposed of over 32,000 acres of land needed for residential purposes alone. This represents over 10 percent of all disposals by Federal agencies for residential uses. Further, Forest Service disposals for this use have been as high as 20 percent in recent years. This is surprising, considering that the Forest Service is not a land disposal agency. This would indicate that increasing pressures are being put on the Forest Service for the use of Forest land. It also indicates the willingness of the Forest Service to recognize the need for Forest land and dispose of its land to accommodate highest and best uses.

It would appear that a modification to the existing system allowing for direct sale by the Forest Service should be considered. Furthermore, such an authority would improve consistency of disposal practices among agencies similar to that of expanding the application of the Recreation and Public Purposes Act to Section 10 lands. The policy considerations discussed therein apply equally to this problem. If all public lands were to be classified for disposal or retention, and priority uses established, this would suggest a realignment of public land laws to apply to a broader base of Federal departments and agencies which manage public lands.

E. Alternative 11 - Forest Service Land Disposal Procedures

1. Summary

Simplification of procedures for disposal of National Forest land through a provision for direct sales.

2. Issues

Where National Forest land is needed for occupancy uses for which disposal is most appropriate the disposal has been accomplished in virtually all instances under authority of the General Exchange Act of March 20, 1922 (16 U.S.C. §485 as amended). Through use of exchange the Forest Service has been able to further progress toward a secondary objective, that of consolidating National Forest lands for the purpose of improved management efficiency. Exchange has also some advantages to the recipient over other possible methods including transfer of all mineral rights, absence of the uncertainty of price and success which are factors under a procedure of competitive bidding and less limitation on acreage.

While disposal by exchange has been heavily favored over other methods open to the Forest Service, the process is cumbersome and time consuming to both parties and it does not facilitate the acquisition of tracts sought by the Forest Service for consolidation in the most orderly sequence of priority.

Two other options for disposal are also available but have been little used. First the Forest Service may declare the land surplus and enable it to be returned to the public domain. The Bureau of Land Management subsequently classifies it for retention or disposal but the Forest Service gains nothing toward National Forest consolidation and another agency is introduced into the process of disposal.

Secondly, the Forest Townsite Act of 1958 provides disposal for townsite purposes but the Act has never been used purportedly because of the limitations on acreages and the limitations on the number of lots that can be disposed of to an applicant at any one time. Furthermore it is generally not consistent with present day subdivision development practices for expansion of urban communities.

3. Key Features

Direct sales would be authorized through expanding the Public Land Sales Act of 1964 (43 U.S.C. § 1421) and the Multiple Use Classification Act of 1964 (43 U.S.C. § 1411) to apply to National Forest lands. These Acts would be amended to remove the present expiration provision. Subsequent regulations promulgated by the Secretary of Agriculture would reflect limited classification of National Forest lands in areas where there is pressure for community establishment or expansion.

4. Probable Advantages

This legislation would enable needed occupancy use disposal in areas of community expansion. Moreover, it would simplify Forest Service disposal procedures, reducing costs. The prices which would be received by the Government would probably be greater through competitive bidding thereby benefiting the national public. In addition it would avoid the limitations presently associated with the Townsite Act of 1958 and the Surplus Property Act of 1944.

5. Probable Disadvantages

Tracts would probably be sold by aution or competitive bid thereby increasing the uncertainty of both price and success of an individual seeking to purchase the land. This is presently not a problem with the exchange procedure.

The Forest Service would not receive land as it does under exchange procedures to further the objective of consolidating National Forest lands.

The land conveyed to the user would be with a mineral reservation by the Government rather than all interests as can be conveyed through exchange procedures.

F. Alternative 12 - Ambiguity as to Whether Retained Lands Can Be Used for New Towns and Expanding Communities

1. Summary

This alternative would provide for new towns, expanding communities, and urban uses of retained lands.

2. Issues

While the Classification and Multiple Use Act of 1964 (43 U.S.C. § 1411) and the Public Land Sales Act of 1964 (43 U.S.C. § 1421) are basically sound, they unclearly exemplify a Federal policy with respect to urban development. It is not clear under 43 U.S.C. § 1411(a) et. seq. whether urban development in the form of new towns and expanding communities is possible only by virtue of disposal. Lands can also be classified for industrial development, outdoor recreation and preservation of public values that would be lost if the land passed from Federal ownership. Although these categories could be interpreted as broad enough to permit urban type development on retained lands, clarification is needed.

3. Key Features

The Multiple Use and Classification Act and the Public Land Sales Act of 1964 would be amended to clearly provide that new towns, expanding communities and urban type development can be permitted on retained lands.

4. Probable Advantages

It is a growing practice among new town developers, e.g., Irvine Ranch, California, to convey interests in land for use and occupancy by others by lease. The original owner retains the fee interest. Persons are generally willing to accept long-term leases such as 50 to 99 years instead of fee interests. The advantage is that the fee owner can regain control at some time in the future and thus redevelop the land in accord with standards then in effect. If all the leases are substantially the same term, the land becomes eligible for redevelopment at substantially the same time. This alternative would be an advantage to the Government as a proprietor as more control over the development could be exercised until such time as the community becomes functional.

5. Probable Disadvantages

A possible disadvantage occurs when occupants attempt to transfer interests when there is a short, e.g., less than 30 years remainder of the term of the lease to transfer. With a short term, persons who wish to buy may not be part of a potential market. In addition, present lessees may put pressure on the underlying fee owner to extend the lease term so that a term nearer a fee may be transferred. If only a short-term lease can be transferred the potential new lessee will not be willing to pay. Moreover, under a lease system, the owner could not generally realize the expectation of property owners in many parts of the country that despite the aging of the improvement, his interest in real estate will be more valuable in the future.

The problem is similar to that existing for vacation homes where vacation home owners expect that their homes will become more valuable and can be sold at a profit whereas in theory they should be amortizing their investment to zero value or to the value of the improvement to someone who has another site on which to move the improvement. Because the expectation does not match the theory, vacation home owners have put great pressure on the Forest Service to provide indefinite and long terms and to compensate for improvements whenever the permit is terminated.

It is more and more true that modern Americans are not place oriented, do not consider the family home site permanent and sacrosanct, and therefore tend to use and occupy real estate as if it were no more important to them than a durable good such as an automobile; it would take further study to devise means so that persons would be willing to amortize their investments in real estate. It will probably continue to be true that persons will want to invest in real estate as a hedge against inflation and will expect to realize more than their investment on sale. In a lease system this expectation can be accomplished only with difficulty.

V. UNSPECIFIED USE DISPOSALS

A. Problem - Land Exchange Procedures

1. Summary of Problem

Policies for Federal exchanges are unwieldy and time consuming. This results in potential delays on occupancy use. Also, it deprives the Federal agencies of the opportunity to acquire certain needed parcels which might otherwise be acquired, since it is frequently simpler for the offerer (the private landowner) to negotiate for non-Federal lands. The problem is most critical for the Forest Service, because exchange is this agency's predominant method of disposal. The major limitations of existing policies are: insufficient delegation of authority; need to balance values of tracts exchanged; constantly fluctuating values of resources exchanged; and the multitude of reviews required. The procedures should be streamlined to facilitate disposal through the exchange procedure.

2. Policy Considerations

One effect of the proposed revisions would be to encourage the Federal agencies to fulfill their proprietary responsibility for policy-making, including appropriate and efficient delegation of authority.

Further, it would facilitate disposal and private use of lands which are no longer of value to the agency (i.e., Forest Service can exchange lands which are no longer of National Forest character) and prevent delay in use of the land for the particular occupancy use. In the Forest Service, for instance, many of the exchanges effect potential occupancies for residential, commercial or other expanding community needs. Delays in negotiation and processing can restrict these occupancy use disposals. Further, involvement of personnel in lengthy exchange transactions are an unnecessary cost to the Government.

B. Alternative 13 - Land Exchange Procedures

1. Summary

This alternative proposes to revise present Federal regulations governing Forest Service and Bureau of Land Management exchanges, as well as subsequent policy outlined in the Forest Service Manual in order to expedite occupancy use disposals.

2. Issues

Existing land exchange laws appear to be adequate. However, the present system of transacting exchanges is extremely unwieldy because of time delays caused by reappraisals to reflect current values at time of exchange, multiple review procedures and insufficient delegation of authority.

3. Key Features

The Chief, U. S. Forest Service, and the Director of the Bureau of Land Management could be directed to review existing procedures for consumating land exchanges to develop a more efficient system of processing. Revisions would include expansion of delegated authority at the regional and state level, and reduction of reviews, approvals at higher levels and documentation required. Increased authority would be delegated to Regional Foresters, and State Bureau of Land Management Directors knowledgeable in this area.

4. Probable Advantages

Land exchanges could be consumated more efficiently and more rapidly. This would eliminate unnecessary cost to the Government and burden on the taxpayer. It would improve the service and reduce the cost to the exchange proponent. Exchange proposals would be less likely to fail for reason of disinterest or frustration of private parties because of lengthy delays. Long delays which prevent or retard development and use of public lands being exchanged pending final agreement would be reduced. Secondary objectives of consolidating Forest Service and Bureau of Land Management holdings would progress more rapidly at lower cost.

This alternative would alleviate the problem associated with escalating values of exchange parcels. This now occurs as a result of the need for reappraisals due to excessive time required to process an exchange. This would be of particular benefit to the recipient contemplating the development of occupancy uses in areas of urban expansion where the problem of price escalation may be critical to the disposal.

5. Probable Disadvantages

None apparent.

VI. SPECIAL PROBLEM AREAS

A. Problem - Conflicting Interests Regarding Railroad Rights-of-Way

1. Summary of Problems

These problems are associated with right-of-way over public land under the jurisdiction of the Departments of Agriculture and Interior.

Under the special and general grants of railroad rights-of-way, Congress restricted their occupancy by railroad companies to railroad purposes. Widths of the rights-of-way varied considerably from 30 feet to 400 feet, and in many cases was far more than was actually occupied by the rail line. Through the years adjacent patentees, unaware of the actual width of the railroad grant, have made use of some of the land, within the rights-of-way not actually occupied by railroad uses.

In addition, railroad purposes have been the subject of various interpretations by Federal and State courts. These factors plus the difficulty and expense of policing railroad rights-of-way have resulted in use of granted railroad right-of-way for other than railroad purposes which are unauthorized and in violation of the original terms of the grants.

Even in areas where use of the right-of-way by railroad lessees is considered to be within the scope of railroad purposes, higher public use priority may displace these lessees, as in cases where water and power projects condemn and relocate railroad rights-of-way. The problem that ensues is one of equitable compensation to the railroads and to their displaced sub-lessees and a determination of whether such compensation should be provided by the Government.

Another problem arises from the conveyances of land within the rights-of-way by railroad companies for non-railroad purposes. To clear title to such land conveyances by the railroad must be validated by Congress because of the reversionary interest the Government possesses in railroad rights-of-way. The cost of enacting private bills, in piecemeal manner by Congress, however, is very high and is a burden on the general public as taxpayers.

2. Policy Considerations

Problems arise over how broadly "use for railroad purposes" may be defined in connection with the uses which the railroad companies can legally make of the land. Railroad purposes has been variously defined. A clarification is needed.

There is a policy question as to whether portions of the rights-of-way which are no longer used by the railroad companies for railroad purposes should be forfeited and returned to the underlying land owner or be retained for possible future use by the railroad. If portions of the rights-of-ways not used for railroad purposes are to be returned by the railroad companies, then what arrangements can be made or authorities granted to accommodate uses which might be made for the benefit of the users, the railroad and the public. The railroads have tended to expand their activities or authorize non-railroad uses by others. The policy to contest or challenge their authority for non-railroad uses and their collection of fees for such uses should be established and appropriate legislation recommended.

A question of policy also arises as to whether the authority should be given to the Secretary of the Interior to quitclaim the interest of the United States to clear the title in cases where a tract is sold to an occupant of the railroad right-of-way or occupied by mistake rather than to have sales by the railroad companies validated by separate Acts of Congress.

B. Alternative 14 - Conflicting Interests Regarding Railroad Rights-of-Way

1. Summary

Provide the Secretary of the Interior with the general authority to diminish the congressionally-granted railroad rights-of-way to that which is used for railroad purposes.

2. Issues

Under the special and general railroad grants of right-of-way the railroads were restricted to an exclusive right to use the right-of-way for railroad purposes only. Railroad purposes have been the subject of various interpretations by the courts. Additionally, many rights-of-way include acreage in excess of needs for railroad purposes. Adjacent or underlying fee owners have in some instances built or otherwise used land within the right-of-way and later subdivided and sold it. This

[illegible] right-of-way was [illegible]

[illegible] patents issued by the [illegible] Act

occurred because the right-of-way was noted only in the granting statute and not in subsequent patents issued by the United States. At present, much right-of-way is used for non-railroad purposes or is not used at all.

3. Key Feature

Authorization would be given to the Secretary of the Interior to survey granted railroad right-of-way, determine that portion being used for railroad purposes only and to diminish the right-of-way to that area. The authority to diminish the land already exists in the automatic reverter clauses of the original statutes. It is the policy to enforce these laws that is lacking.

The Secretary of the Interior would additionally be given the authority to convey the interest of the Government to the occupant on land within the right-of-way being used for other than railroad purposes by other landowners.

4. Advantages

Congressionally granted railroad rights-of-way would be utilized strictly for railroad purposes as required by the original terms of the grants without further legislation and divergent court opinions as to what constitutes a railroad purpose. Private individuals who are underlying fee owners would have clear title and their use of the land would no longer be illegal. Where title to the underlying fee or legal subdivisions over which the railroad right-of-way crossed is still in the railroad, the railroad would have unencumbered title. Where the lands are still public domain, the United States would have unencumbered title to lands not used for railroad purposes. The railroads would be responsible for policing their lands from time notice of determination of nonuse was given by the Secretary of the Interior, eliminating the need for this to be done by the Government.

In addition, unlike previously proposed legislation (i.e., H.R. 6630) the holder of the underlying fee would not be at the mercy of the railroads. Rather the Government would control the situation and be able to afford property protection to innocent purchasers and their successors in interest.

Further, excess rights-of-way within municipalities would be made available for public projects of benefit to a greater number of people. Property interest would be conveyed by deed and recorded to make the ownership clear in subsequent transactions.

5. Disadvantages

The proposed survey by the Department of the Interior would be costly.

C. Alternative 15 - Conflicting Interest Regarding Railroad Rights-of-Way

1. Summary

The United States would quitclaim any and all interest, except in minerals, in railroad rights-of-way that do not traverse current public domain lands.

2. Issue

The Government's reverter interest in rights-of-way is complicated by questions as to the type of interest, who is the underlying fee owner, what compensation it should receive, if any, and the fact that the records on railroad rights-of-way are incomplete. Only those areas where railroad rights-of-way cross current public domain would be of concern to the Government.

3. Key Feature

The Department of the Interior would be authorized to survey all public lands, as necessary for the quitclaim of the United States' interest in railroad rights-of-way across nonpublic lands, excepting mineral rights. A quitclaim of the United States interest would be issued by Congress.

4. Advantages

Numerous private bills requiring congressional validation of railroad conveyances and the resulting costs would be eliminated.

The public domain lands would be protected from an artificial division in the event of abandonment of the right-of-way by railroad companies. Also, the expense of clearing the title of other landowners would not be borne by the Government.

The railroad companies would benefit by being able to lease or sell land within the rights-of-way not needed for railroad purposes. The non-railroad users would benefit by being assured of the interest acquired from the railroad companies. The general public would benefit from the better and more complete use made of the land.

5. Disadvantages

The United States as landowner would lose an interest in property without compensation. Also, the cost of a survey needed for the quitclaim of all railroad rights-of-way would be high.

D. Alternative 16 - Designation of Railroad Companies as Agents of the United States in the Administration of Non-Railroad Uses on Railroad Rights-of-Way

1. Summary

The railroad companies would be designated as agents of the United States for the administration of all non-railroad uses on the railroad rights-of-way and would be authorized to collect fees for such uses. It would be provided that a specified portion of the receipts collected would be paid to the underlying land owner and part would be retained by the railroad companies.

2. Issues

The railroad companies have no apparent property interest to use railroad rights-of-way for other than railroad purposes. Other uses cannot be authorized by the Government as long as the rights-of-way land is used for railroad purposes. However, the use of the railroad rights-of-way for non-railroad purposes is desirable from the standpoint of the potential user and the Nation in the full utilization of the potential resources.

3. Key Feature

The key feature would be to turn the administration of non-railroad uses over to the railroad companies to enable the full utilization of the available resource not immediately needed by the railroad but leaving the rights-of-way essentially intact. This would be done without a great burden on the Government to administer the plan.

4. Advantages

Railroad companies would not be required to forfeit land in the railroad rights-of-way which is retained in ownership but used for non-railroad purposes.

The Government would not be burdened with heavy costs of administering the uses.

The underlying owners of the land would receive some benefit for use of the land which is not owned by the railroad.

The railroads would benefit from receipts for non-railroad uses and retention of the rights-of-ways.

The users would benefit by having more railroad lands available.

The Nation would benefit from the more complete availability and use of resources not needed for railroad purposes.

5. Disadvantages

The Government would not gain any receipts for its interest in the land.

E. Problem - Natural Areas Policy

1. Summary of Problems

The fundamental problem relating to natural areas is the lack of a single, uniform policy applied consistently by all Federal land managing agencies. Current policy variations promote inefficient natural area use and hamper evaluation of current, much less future or ideal, natural area needs.

Component problems relate to differences in or lack of: (1) objectives, i.e., a stated purpose and definition of a natural area system; (2) an overall classification scheme delineating all indigenous U.S. natural features types into appropriate categories and subdivisions; (3) an inventory of currently and potentially available land with identification of natural types represented; and (4) criteria for selection and priority ranking of appropriate sites.

In terms of objectives there are wide variations among Federal agencies and private groups in the natural area field as to their respective definitions of a natural area system. Conservancy groups stress protection of individual endangered species, giving top priority to preservation before other considerations. Scientific interests, on the other hand, promote maintenance of ecological research facilities. Many Federal agencies attempt to achieve a balance between the two approaches.

In terms of classification, a uniform system does not exist, due chiefly to a lack of awareness of all natural area types indigenous to the U.S. At present there is documentation of only types actually observed, and even this is limited. For instance, prior to the study by the Federal Committee on Research Natural Areas there were only two classification schemes for vegetation - the Kuchler Classification for grassland types, and that of the Society of American Foresters for forest types. Although the Committee on Natural Areas broadened the scope, including these two delineated by geographical occurrence and adding a few other categories previously unaccounted for, its efforts were insufficient as a comprehensive balanced scheme. For example, though the Committee broadened and further delineated the vegetative types, which now comprise seven divisions, only one section of the system was designated for the entire animal world.

The problem regarding an inventory has to do with the inadequacy of accurate information on types actually represented, the extent of land currently designated for natural area use, and the amount of additional such land available. The absence of a cohesive classification scheme and variations in terminology result in data which cannot be considered a reliable index of the current situation.

The criteria for selection and priority ranking of appropriate individual natural area sites has been hampered by the lack of an adequate classification system. For example, a valid decision cannot be made on which species have priority for preservation if it is not known how many of that species already exist.

The problem of agency policy variation with respect to natural areas results from each agency having originated independently their own natural area objectives. 2/ Each of these objectives related in general to a system of natural areas, but specific objectives established divergent paths based on individual agency emphasis. Efficiency in natural area management is greatly inhibited by this lack of uniformity and by attendant fragmentation of authority.

2. Policy Considerations

Optimum balance between the objectives of different agencies is always difficult to determine. In this respect, though uniformity must be achieved in natural area policy, it is sure to generate specific objections from certain Federal agencies. In matters of natural area classification, objections may be overcome with a certain amount of compromise. More important, however, agencies may dispute emphasis and jurisdiction in terms of their respective traditional goals.

If withdrawal of additional lands for natural areas is necessary, and these lands are under control of a Federal agency not concerned with natural area objectives, further conflict will likely result. In such a case the validity of natural area needs as a whole must be balanced against the interests of the Federal agency controlling the land. Moreover, policy unity among Federal agencies in itself cannot overcome the weaknesses of fragmented authority in coping with such a conflict.

Great benefit can be derived in cooperation with private conservancy groups. Such groups have already done much toward species preservation, but need Government help to achieve this objective adequately. In addition, alliance with conservancy as well as university and scientific groups would benefit the research efforts of all groups and eliminate much duplication.

Conservancy groups, however, can exhibit a peculiar paradox which must be considered -- a potential for ultimately generating more destruction than they originally set out to prevent. An attempt to "save" one endangered species may result in jeopardizing an entire ecosystem by disrupting natural processes.[3/] Many of these groups are composed of a core of true conservancy experts surrounded by a mass of concerned private citizens. The latter have varying degrees of knowledge relating to the field. Many sites of threatened species which have been acquired by such groups could be of value, however, if combined with an overall natural area system. A sound natural area policy instituted by the Federal Government could do much to bring about such a system.

F. Alternative 17 - Natural Area Objectives

1. Summary

The policy objectives of a natural area system would be clearly established prior to further acquisition or withdrawal of public lands for natural area sites by individual Federal agencies.

2. Issue

At present there are no clear, uniform policy objectives for Federal agencies to follow in selecting natural areas. Consequently, present efforts to select and classify natural areas are without a rational basis. Further, it is unclear as to who (conservationists, scientists, the public, the Government) is to benefit from the systemization of natural areas or the manner in which they will benefit. This is essential to the development of uniform natural area objectives.

3. Key Feature

Enact legislation to establish uniform natural area objectives to be followed by all Federal agencies in the selection of natural area sites. Further, establish the needs of those groups which are to benefit from the system.

4. Advantages

This legislation would further the Government's and public's interest in efficient allocation of natural resources. It would provide the necessary foundation for classifying and selecting natural areas.

5. Disadvantages

None apparent.

G. Alternative 18 - Classification of Natural Areas

1. Summary

Undertake a study to develop adequate classification for all major natural features, inventory natural area sites, and provide criteria for determining the major ecosystems.

2. Issue

At present there is no adequate classification system upon which to base the selection of natural areas once the objectives have been established. The classification system devised by the Federal Committee on Research Natural Areas, which is presently being used by Federal agencies, is little more than a documentation of those species and features present in the natural areas listed in its Directory. Though the Committee stresses the importance of ecosystems, little has been done to categorize and delineate what constitutes an ecosystem. Absence of an adequate classification system makes it impossible to inventory current and potentially available natural area sites, and to develop criteria for selecting among sites to form major ecosystems.

3. Key Feature

A joint study would be undertaken by all Federal land administering agencies to (1) develop a uniform classification for all major natural features, (2) develop criteria for selecting among sites to form major ecosystems and (3) inventory natural area sites in cooperation with private conservancy groups.

3. Key Feature

Enact legislation to establish uniform natural area objectives to be followed by all Federal agencies in the selection of natural area sites. Further, establish the needs of those groups which are to benefit from the system.

4. Advantages

This legislation would further the Government's and public's interest in efficient allocation of natural resources. It would provide the necessary foundation for classifying and selecting natural areas.

5. Disadvantages

None apparent.

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Undertake a study to develop adequate classification for all major natural features, inventory natural area sites, and provide criteria for determining the major ecosystems.

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At present there is no adequate classification system upon which to base the selection of natural areas once the objectives have been established. The classification system devised by the Federal Committee on Research Natural Areas, which is presently being used by Federal agencies, is little more than a documentation of those species and features present in the natural areas listed in its Directory. Though the Committee stresses the importance of ecosystems, little has been done to categorize and delineate what constitutes an ecosystem. Absence of an adequate classification system makes it impossible to inventory current and potentially available natural area sites, and to develop criteria for selecting among sites to form major ecosystems.

3. Key Feature

A joint study would be undertaken by all Federal land administering agencies to (1) develop a uniform classification for all major natural features, (2) develop criteria for selecting among sites to form major ecosystems and (3) inventory natural area sites in cooperation with private conservancy groups.

4. Advantages

A comprehensive classification system would give maximum continuity to a natural area system. The consolidation of many related species and natural features in an ecosystem would simplify protection and optimize research opportunities and benefits. Further, this consolidation could result in long-range reductions in management and administrative costs.

5. Disadvantages

None apparent.

Footnotes

1. "Danger tree zone" is defined as the area beyond the right-of-way in which the distance of a tree from the transmission line is less than the height of the tree.

2. See Part 5, Analysis of the Present System, for a discussion of agency policies regarding natural areas.

3. Former National Park Service Director Horace Albright relates the following example. One consortium of groups, fighting to save the redwoods from the inroads of commercialization, purchased isolated stands of the trees. This was done at greater expense than acquisition of a smaller stand with an adequate drainage system. In the attempt thus to save a larger number of trees, the species needs per site were overlooked. The result was inadequate protection and resulting contamination of those stands.